(28,245)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 888.

JOSEPH W. COX, APPELLANT,

vs.

ETHEL HART.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 16, 1921.

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No. 3526

United States

Circuit Court of Appeals

For the Ninth Circuit.

JOSEPH W. COX,

Appellant,

vs.

ETHEL HART,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

In the United States District Court, Southern District of California

IN EQUITY—No. D. 110.

ETHEL HART,

Complainant,

vs.

J. W. COX,

Defendant.

Citation on Appeal.

To Ethel Hart, and to Her Attorneys, Messrs. Geo. H. P. Shaw, and Hunsaker, Britt & Edwards:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the City of San Francisco, in the State of California, on the 3d day of May, 1920, pursuant to an order allowing an appeal filed and entered in the clerk's office of the District Court of the United States, for the Southern District of California, from a final decree signed, filed, and entered on the 3 day of February, 1920, in that certain suit, being in equity No. D. 110, wherein Ethel Hart is plaintiff, and Joseph W. Cox is defendant and appellant, to show cause, if any there be, why the decree rendered against the said appellant, as in said order allowing appeal mentioned, should not be corrected, and why justice should not be done to the parties in that behalf.

Witness the Honorable OSCAR A. TRIPPET, United States District Judge for the Southern District of California this 16th day of April, 1920, and

of the Independence of the United States the one hundred and forty-fourth.

ERSKINE M. ROSS,
U. S. Circuit Judge. [1*]

[Endorsed]: In Equity—D. 110. In the United States District Court, Southern District of California. Ethel Hart, Plaintiff, vs. J. W. Cox, Defendant. Citation on Appeal. Filed Apr. 28, 1920. Chas. N. Williams, Clerk. By R. S. Zimmerman, Deputy Clerk.

Received copy this 16th day of April, 1920.

HUNSAKER, BRITT & EDWARDS,
G. H. SHAW,
Solicitors for Complainant. [2]

Names and Addresses of Attorneys.

For Appellant:

M. W. CONKLING, Esq., El Centro, California.

For Appellee:

Messrs. HUNSAKER, BRITT & EDWARDS, Los Angeles, California. [3]

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*Page-number appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States in and for the Southern District of California, Southern Division, Sitting at Los Angeles.

IN EQUITY—No. ——

ETHEL HART,

Plaintiff,

vs.

JOSEPH W. COX,

Defendant.

Bill to Declare a Trust as to Real Property, and to Obtain a Decree Requiring Defendant to Convey the Legal Title Thereto to Plaintiff.

Ethel Hart, a citizen of the State of California, residing in the county of San Bernardino, in said state, alleges as her bill of complaint against Joseph W. Cox, a citizen of the State of California, residing in the county of Imperial, in said state, as follows:

1. In the 1856 certain public lands of the United States, then situated in the county of San Diego, State of California, but now situate in the county of Imperial, in said state, were surveyed under the authority of the Government of the United States, and in the year 1857 the survey thereof was approved and the approved plat filed in the Department of the Interior and in the local land office in the district in which said land was located. All of the territory embraced within said survey was arid, desert land, and remained vacant and unoccupied until about the year 1900. Prior to the last-mentioned date the

monuments referred to in the field-notes of said survey of 1856 had, to a great extent, been obliterated, and it was difficult, and in many cases impossible, to trace upon the ground the boundaries of the governmental subdivisions as established by said survey. None of the original section [4] or township corners placed upon or near the tract of land hereinafter particularly described in said survey thereof remained in place, nor were any of them ever found; and it was impossible, until after the resurvey of said land as hereinafter stated, to determine what section said tract of land was located in, according to said original survey.

2. July 1, 1902, a statute was passed by the Congress of the United States and approved by the President, entitled: "An Act providing for the resurvey of certain townships in San Diego County, California," which act is in the words and figures following:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized to cause to be made a resurvey of the lands in San Diego County, in the State of California, embraced in and consisting of the tier of townships thirteen, fourteen, fifteen and sixteen south, of ranges eleven, twelve, thirteen, fourteen, fifteen, and sixteen east, and the fractional township seventeen south, of ranges fifteen and sixteen east, all of San Bernardino base and meridian; and all rules and regulations of the Interior De-

partment requiring petitions from all settlers of said townships asking for resurvey and agreement to abide by the result of the same so far as these lands are concerned are hereby abrogated: *Provided,* That nothing herein contained shall be so construed as to impair the present *bona fide* claim of any actual occupant of any of said lands to the lands so occupied. Approved, July 1, 1902."

The Secretary of the Interior thereafter, pursuant to the provisions of said act, caused a resurvey of the lands therein mentioned to be made. The plat of said resurvey of the township in which the lands described in paragraph 5 hereof is located, was filed in the office of, and approved by, the United States Surveyor-General for California November 4, 1908, and was thereafter, to wit, February 24, 1909, filed in the local land office of the district in which said land was then situate. [5]

3. Plaintiff is, and at all times hereinafter mentioned was, a citizen of the United States, over the age of twenty-one years, and at no time has she made, or attempted to make, any entry of any land under the Act approved March 3, 1877, entitled, "An Act to provide for the sale of desert lands in certain states and territories," as amended by the Act of March 3, 1891, and never at any time made any declaration for the entry of desert lands, nor any other entry under the provisions of said Act, except as hereinafter set forth, nor has she at any time had assigned to her any lands entered under said Act; and she had not entered or acquired title to, nor did she at any

time claim under any entry made under any of the nonmineral public land laws, an amount of land which, together with the land hereinafter described and applied for by her, would exceed in the aggregate 320 acres.

4. February 1, 1906, the land hereinafter particularly described was unoccupied, desert land of the United States. There was no watercourse through or upon said land; said land was not naturally irrigated or watered overflowed at any season of the year by any natural stream, spring, or other body of water; said land would not, without artificial irrigation, produce an agricultural crop of any kind or amount; and it would not, when unfed by grazing animals, produce native grasses sufficient in quantity to make an ordinary crop of hay in usual seasons; and there were no trees on said land. The said land was essentially dry and arid land, wholly unfit for cultivation without artificial irrigation, and the same could not be successfully cultivated without being reclaimed by conducting water thereon. No part of said land had ever been reclaimed by conducting water thereon, and there were no lands in the vicinity of said tract that were occupied by settlers and cultivated without artificial irrigation. There was not, within the limits thereof, any vein or lode of [6] quartz or other rock in place bearing gold, silver, cinnabar, lead, tin or copper, or any deposit of coal; there was not within the limits of said land any placer, cement, gravel, or other valuable mineral deposits, salt springs, or deposits of salt; and no portion of said land had been claimed for mining pur-

poses under the local customs or rules of miners or otherwise. No portion of said land had been worked for mineral at any time by any person or persons, and the same was and is essentially nonmineral land; and plaintiff did not enter, or attempt to enter, on said land as hereinafter stated, for the purpose of fraudulently obtaining title to mineral land, timber land or agricultural land, but for the purpose of faithfully reclaiming the said tract of land, by conducting water thereon; said land was not occupied or improved by any Indian, and was, at the several times hereinafter stated, unoccupied, unimproved and unappropriated by any person claiming the same other than plaintiff.

5. February 1, 1906, plaintiff, intending to comply with, and pursuant to, the provisions of said Act of March 3, 1877, entitled, "An Act to provide for the sale of desert lands in certain states and territories," and the Act amendatory thereof, and intending to reclaim, and to reclaim, said land by conducting water upon the same, as in said Act provided, entered upon and took possession of said land, consisting of 320 acres, and which is in this paragraph referred to as "said land." Plaintiff so entered into possession of said land on February 1, 1906, and begun at that time the reclamation of said land, and it was at all times thereafter the intention of plaintiff, in good faith, to reclaim said land and make final proof thereon. Said tract of land upon which plaintiff entered and took possession as aforesaid had a slope from the southeast to the northwest, and the highest point upon said land was at the southeast corner of

said tract, and said point was the one best adapted and suitable for bringing water onto said tract for the irrigation thereof, and whereunder [7] all reclamation in the neighborhood in which said tract of land is located was usually inaugurated at or near the highest point of any given subdivision so that the water might be most conveniently distributed over the entire tract.

On or about the first day of February, 1906, plaintiff plowed a furrow upon the exterior boundary lines of said tract, and posted a notice upon said land stating that she had taken possession of the same and intended to reclaim and enter said land under the provisions of said Desert Land Act. On said last-mentioned date she commenced the work of leveling, bordering and ditching the same so as to place said land in condition for the planting of a crop and the irrigation of the said land, about 85 acres in the southeast corner of said tract; and the plaintiff also plowed and constructed a ditch along the east line of said tract commencing at the southeast corner thereof, and extending along the east line thereof about one-fourth of a mile, which ditch extended along the east boundary of said 85 acres so leveled, bordered and ditched as aforesaid; and, at the same time, the plaintiff leveled, bordered and ditched about five acres of said land lying and adjoining said 85 acres upon the west; and after the completion of said leveling, bordering and ditching of said land as aforesaid, the plaintiff planted all of said land so leveled bordered and ditched, to wit, about 85 acres thereof, in barley, the work of planting which barley was

completed on or about March 1, 1906.

After said land was so planted to barley plaintiff procured and conducted water to and upon said land so planted to barley, and between the time of the planting of said barley, as aforesaid, upon said 85 acres of the southeasterly portion of said land, and the month of June, 1906, said barley was irrigated seven or eight times. And between the planting of said aforesaid five acres to barley and during the months of February [8] and March, 1906, said five acres was irrigated twice.

After said barley matured and in the summer of 1906, the plaintiff fenced said 85 acres planted to barley, as aforesaid, in the southeast portion of said tract. Said fence was of a substantial character and sufficient to turn cattle, which fence so erected upon said 85 acres has ever since remained thereon. After said tract of 85 acres had been so fenced, the crop of barley grown upon said land was fed off by hogs.

During the first days of November, 1906, and prior to the 8th day of November, 1906, the plaintiff constructed a head ditch on the east side of the west half of said entire tract, which ditch was located along the east line of that part of said entire tract which was designated as Tract 113 on the resurvey thereof hereinafter mentioned. At the time last aforesaid plaintiff commenced plowing the land for the purpose of constructing borders for the irrigation of said land on the south half of the west half of said entire tract (the same being the south half of said Tract 113), and also put up flags upon said south half for the purpose of marking the lines so as to do the plowing

for the construction of borders thereon.

6. November 8, 1906, while plaintiff was in the possession and occupation of said entire tract of land, as hereinabove stated, and during her temporary absence, defendant, without her consent, and against her will, entered upon and took possession of, the west half of said entire tract, and ousted and ejected plaintiff therefrom, and thereafter, and until he was ejected therefrom under a writ of possession issued out of the Superior Court of the county of Imperial, State of California, as hereinafter stated, defendant withheld from plaintiff the possession of the west half of said tract. Thereafter, to wit, on or about February 4, 1908, plaintiff commenced an action in the Superior Court of said county of Imperial against defendant to [9] recover possession of said west half of said tract from defendant. May 21, 1908, by leave of the Court in which said action was pending, plaintiff filed an amended complaint, in which she alleged that at all times therein mentioned she had been the owner and entitled to the possession of said tract of land, to wit, the west half of said entire tract; that she had been in the possession of said property, and the whole thereof, from on or about February 1, 1906, down to on or about November 8, 1906, at which time defendant entered into the possession of said land and ousted the plaintiff, and ever since that date had unlawfully withheld the possession thereof from plaintiff. Thereafter, to wit, June 6, 1908, defendant filed his answer to said amended complaint, wherein he denied that plaintiff is, or at any time was, the owner, or entitled to the possession,

of the land described in said amended complaint, or any part thereof, or of any interest therein, and wherein he further denied that plaintiff was in possession of said property, or any part thereof, from on or about November 8, 1906, or at any other time, or at all, and wherein defendant further denied that he then unlawfully withheld the possession thereof from plaintiff. Thereafter said cause came on regularly for trial, a jury was duly empanelled and sworn to try the issues made by said amended complaint and the answer thereto, and, after plaintiff and defendant had, respectively, introduced their evidence, and the Court had instructed the jury as to the law, the said cause was submitted to the jury, and thereafter, to wit, February 10, 1909, the jury returned a verdict finding that the plaintiff was entitled to recover of and from the defendant possession of the said premises. Thereafter, to wit, February 10, 1909, judgment was given in said action by said court, in accordance with said verdict, that the plaintiff do have and recover of and from the defendant the possession of said parcel of land, and thereafter, on or about February 10, 1909, said [10] judgment was duly entered by the clerk of said court. Thereafter the defendant in said action moved said Superior Court for a new trial, upon the following grounds, to wit: (1) Irregularity in the proceedings of the court, jury and adverse party, by which the defendant was prevented from having a fair trial; (2) Insufficiency of the evidence to justify the verdict, and that the verdict was against law; (3) errors in law occurring at the trial and excepted to by the defendant. Said motion

for a new trial was made upon a statement containing all of the evidence in said case, together with the instructions given to the jury and those refused, and, December 6, 1912, said motion for a new trial was denied by said court. Thereupon said defendant appealed to the Supreme Court of the State of California from said order denying his said motion for a new trial. Thereafter such proceedings were had in said action in the Supreme Court of the State of California that November 22, 1915, said Supreme Court rendered its decision and judgment affirming said order denying said motion for a new trial. Thereafter, and on or about December 22, 1915, said Supreme Court issued its *remittitur,* under the seal of said court, affirming said order denying said motion for a new trial, and thereafter said *remittitur* was filed in said Superior Court of said Imperial County.

After the rendition and entry of said judgment as aforesaid, and on or about February 12, 1909, a writ of possession was issued out of said Superior Court of Imperial County, under the seal of said court, in said action, commanding the sheriff of said county to dispossess the defendant from the possession of the land involved in said action and to place the plaintiff in possession thereof. Thereafter, and on or about March 3, 1909, said writ of possession was executed by said sheriff, and defendant was dispossessed of said land and plaintiff was placed in the possession of the same by said sheriff. Plaintiff ever since [11] said last-mentioned date has been in the actual possession and occupation of said west half of said tract

of land, and defendant has not since said date been in the possession or occupation of any part thereof. Defendant did not, during the time he excluded plaintiff from the possession thereof, as hereinabove alleged, reclaim said land, or any part thereof by conducting water thereon, nor has he at any time commenced the reclamation of said land in good faith or at all.

7. At all times subsequent to February 1, 1906, plaintiff has been in the actual possession and occupation of the east half of said tract of land cultivating and reclaiming the same. During the year 1907 a crop of barley was planted, irrigated and raised by plaintiff on the south half of the east half of said entire tract, and the same was harvested by her. In the year 1908 said south half of the east half of said entire tract was planted to barley and irrigated by the plaintiff and harvested. During the year 1909, after plaintiff was so put into possession of said west half of the tract by the sheriff of Imperial County, as aforesaid, said west half was leveled, bordered and ditched by the plaintiff for the purpose of irrigating the same, and said west half was planted to barley by said plaintiff, and said crop of barley was irrigated by water conducted thereon by plaintiff, and said crop of barley, after maturity, was harvested by plaintiff. During said year 1909 the plaintiff inclosed said west half with a substantial fence, and the same ever since has remained and been so inclosed. In said year 1909 the north half of the east half of said tract was leveled, bordered and ditched by the plaintiff, and a crop of barley was planted by

the plaintiff on said last-mentioned land, and the same was irrigated by the plaintiff and was, after maturity, harvested by plaintiff, and said tract was inclosed with a substantial fence, and has ever since remained inclosed by a substantial [12] fence. In said year 1909 said south half of the east half was planted to barley and irrigated by the plaintiff, and, after maturity, was harvested by the plaintiff. Ever since said year 1909 and during the years 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, all of said land has been planted by the plaintiff to crops, consisting of barley and corn, each and every year, and said crops have been irrigated and cultivated by plaintiff, and have been brought to maturity and been harvested by plaintiff.

8. March 31, 1906, the Commissioner of the General Land Office, by a telegram bearing that date and addressed to the United States Land Office, Los Angeles, California, directed the Register and Receiver at Los Angeles, California, to suspend entries in townships thirteen (13) to sixteen (16) south, ranges eleven (11) to sixteen (16) east, and in township seventeen (17) south, ranges fifteen (15) and sixteen (16) east, San Bernardino Meridian (which townships included the lands hereinbefore particularly described), after March 31, 1906. Thereafter, and until the completion, approval and filing of the plat of said resurvey, as hereinabove alleged, said lands were treated and regarded by the Commissioner of the General Land Office and the Register and Receiver of the local land office, as having the status of unsurveyed land under suspension.

On and after the 31st day of March, 1906, and until the filing of the plats of the resurvey of the different townships embraced in said resurvey, as hereinafter stated, by the rules, regulations and orders of said Department of the Interior, no homestead entries were allowed or received of any of said lands, and such entries only under the Desert Land Act were received and the same were suspended, and by said rules, regulations and orders all applications for desert land entries were required to set forth and describe the land as near as possible [13] according to said survey of 1856, subject to adjustment according to the resurvey when made.

9. After the plaintiff took possession of said entire tract of land hereinbefore set forth, to wit, on or about February 1, 1906, she applied to the Register and Receiver of the United States Land Office at Los Angeles, California, to be allowed to make desert land entry of said tract of land so taken possession of by her, and on or about June 10, 1906, she made such offer, but at all times she was informed and advised by said Register and Receiver that she could not make, and would not be permitted to make, desert land entry in said office of said land or any part thereof, and that the only way in which she could protect her rights and secure a preference right to enter said land under the Desert Land Act was for her to remain in the possession thereof and to continue the reclamation of the same until the filing of the plats of the resurvey of said land, when she would have, and be entitled to, a preference right to enter said land. Plaintiff relied, and in good faith acted

upon, such information and advice. Thereafter she was informed and advised that if an application were made by her to enter said land under said act, in which application the land should be described according to the original survey of 1856, it would be received and probably rejected, and thereupon an appeal could be taken by her from such order of rejection to the Commissioner of the General Land Office. Relying and acting on such advice, plaintiff, July 30, 1907, filed in said local land office her desert land application to enter said entire tract under said Desert Land Act, and described said land in said application as

> The NE. ¼ of sec. 13, T. 14 S., R. 14 E. S. B. M., and the NW. ¼ of sec. 18, T. 14 S., R. 15 E., S. B. M.,

as situated at that time in the county of San Diego, State of California, and plaintiff did then and there tender and offer to pay [14] to the Register and Receiver of said local land office the sum of twenty-five cents per acre as the initial payment for said land. Said application was filed July 30, 1907, in said United States Land Office, at Los Angeles, and thereafter, to wit, November 7, 1907, was rejected upon the ground that the lands described were included in prior valid entries. At the time of making said filing there were entries of record in said office for the lands described as the NW. ¼ of said section 18, but no entry affecting the land described as said NE. ¼ of section 13. Thereafter, to wit, December 7, 1907, plaintiff appealed to the Commissioner of the General Land Office from the action of said Register

and Receiver in rejecting said claim, and thereafter such proceedings were had that October 3, 1910, the action of said Register and Receiver in rejecting said application of the plaintiff was affirmed. The description of the land contained in said application was a correct description of said land according to the aforesaid survey of 1856, as near as it was possible to describe said land according to said survey of 1856. Plaintiff alleges that, as a matter of fact, said land was not included in any other valid entry.

10. July 17, 1907, defendant filed with the Register and Receiver of the United States Land Office, at Los Angeles, an application under the aforesaid Desert Land Act, to enter said land described in his application as follows:

> Commencing at a point 6280 feet south and 1134 feet east of a stake in township line between townships 13 and 14 S., R. 15 E., as marked on the ground by U. S. surveyor A. A. Henderson, in the official resurvey of the exterior line of said township, which stake is marked to indicate common corner to sections.
>
> $$\frac{31 : 32}{6 : 5}$$
>
> and running thence south 40 chains; thence west 40 chains; thence north 40 chains; thence east 40 chains; to place of beginning. Said point of beginning is also five miles and 2506 feet west from a point which, from its relation and bearing to Sunset Spring, as described in [15] the field-notes of the original survey of said land

made in 1856, is believed to be the common corner of sections

$$\begin{array}{c} 11 : 12 \\ \hline 14 : 13 \end{array}$$

S., R. 15 E., according to said original survey of 1856, containing 160 acres.

At the time said application was made, one Henderson had made a preliminary survey of the exterior boundaries of said township, but said survey had not been accepted or approved. Said application was, July 23, 1907, rejected by said Register and Receiver, upon the grounds that the land described in said application was not described with reference to established lines of said original survey, as required by the rules, regulations and orders of the Department. December 7, 1907, defendant appealed from said action of the Register and Receiver in rejecting said application, to the Commissioner of the General Land Office, and such proceedings were thereafter had that October 3, 1910, said action of said Register and Receiver was affirmed by the Commissioner of the General Land Office, and no appeal was taken from such order to the Secretary of the Interior.

11. By the rules, regulations and orders of the Secretary of the Interior, the deputy United States surveyors in making the aforesaid resurvey were instructed and ordered to survey upon the ground as private land claims all existing applications for the entry of said lands under any of the laws of the United States, and to designate said private land claims upon the plats of said resurvey as tracts, to-

gether with the number thereof. The entire parcel of land claimed by plaintiff and of which she was in possession, as hereinbefore alleged, was designated upon the plat of the resurvey of township 14 S., R. 15 E., S. B. M., as Tracts 113, 114, and the south half of tract 115. Tract 113 was designated upon the plats of the resurvey as the northeast quarter of section 13, township 14 south, range 15 E., S. B. M., according to the survey of 1856. At no time prior [16] to the filing of the plats of the resurvey did the defendant make application to make entry of any lands described as the northeast quarter of section 13, township 14 S., R. 14 E., S. B. M., according to said survey of 1856.

12. March 28, 1908, the Congress of the United States passed, and the President approved, an Act entitled,

> "An Act limiting and restricting the right of entry and assignment under the desert land law and authorizing an extension of time within which to make final proof."

Section 1 of which Act is in words and figures following:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the passage of this Act the right to make entry of desert lands under the provisions of the Act approved March third, eighteen hundred and seventy-seven, entitled 'An Act to provide for the sale of desert lands in certain States and Territories,' as amended by the Act approved March

third, eighteen hundred and ninety-one, entitled 'An Act to repeal the timber-culture laws, and for other purposes,' shall be restricted to surveyed public lands of the character contemplated by said Acts, and no such entries of unsurveyed lands shall be allowed or made of record: *Provided, however,* That any individual qualified to make entry of desert lands under said Acts who has, prior to survey, *taken possession* of a tract of unsurveyed desert land not exceeding in area three hundred and twenty acres in compact form, *and has reclaimed or has in good faith commenced the work of reclaiming* the same, shall have the *preference right* to make entry of such tract under said Acts, in conformity with the public land surveys, within *ninety* days after the filing of the approved plat of survey in the district land office."

13. Pursuant to the statute in such cases made and provided, notice by posting was given by the Register and Receiver of said local land office that the plat of the resurvey of the township in which said land was situated would be filed in such district land office February 24, 1909.

14. February 24, 1909, plaintiff filed a protest with the Register and Receiver against [17] the correctness of the plats of said resurvey designating tract 113 as covered by the entry of defendant. No action was ever taken on said protest.

15. March 1, 1909, defendant filed with the Register and Receiver of the local land office, at Los Angeles, California, his application to enter under

the aforesaid Act of March 3, 1897, and the Acts amendatory thereof, said tract No. 113, in T. 14 S., R. 15 E., S. B. M., containing 160 acres, which application had been sworn to by said applicant before the county clerk of the Superior Court of the county of Los Angeles, February 27, 1909, and in which application defendant stated that he settled on and commenced the reclamation of said land November 8, 1906, and that he intended to claim the benefit of said settlement. On the filing of said application, to wit, March 1, 1909, the Register and Receiver suspended said application; and thereafter, to wit, October 25, 1910, the Register and Receiver further suspended said application pending action on the application of plaintiff D. L. E. No. 06196, hereinafter mentioned.

16. Within ninety days after the date of the filing of the plat of said survey in the local land office, to wit, May 15, 1909, plaintiff made application to the Register and Receiver of the local land office for and to enter, under the provisions of said Act of March 3, 1897, and the Acts amendatory thereof, the tract of land she so settled upon February 1, 1906, and which said land was described in said application as tracts 113, 114 and the south one-half of tract 115, in T. 14 S., R. 15 E., S. B. M., as shown on the official plat of survey of said township filed in the United States Land Office on February 23, 1909. Said application was designated by the officers of the local land office as serial No. 06196. In her said application plaintiff stated that she entered into the possession of said land February 1, 1906, and began at

that time [18] the reclamation of said land, which has been kept up continuously to this date, and it is now, and always has been since the date of taking possession, the intention of plaintiff in good faith to reclaim said land and make final proof thereon; that on July 30, 1907, plaintiff made application in regular form to file a desert land entry on said land, giving the description as the NE. ¼ of section 13, T. 14 S., R. 14 E., and the NW. ¼ of section 18, T. 14 S., R. 15 E., S. B. M., the same being the identical land referred to in said desert land application, and the same being the best possible description that could be given without resurvey, the same being at the time unsurveyed Government land of the United States, that said application was rejected by the Los Angeles land office and plaintiff notified of said rejection on November 7, 1907, and that plaintiff thereafter, within the time allowed by law, took an appeal from said rejection to the Commissioner of the General Land Office, which said appeal was at the time of the making of said application, on the 15th day of May, 1909, undecided and pending; that plaintiff further stated in said affidavit that she was at the time of taking possession of said land qualified to make entry thereof under the desert land laws, and ever since had been so qualified to make entry thereof, and the same was at the date of occupation, unsurveyed, unoccupied and unimproved public land of the United States, desert in character; that plaintiff had made every effort to file on said land and made desert land application therefor in due form, and tendered the legal fees to

the Register and Receiver, as set forth in said affidavit, but that at no time subsequent to entering into possession was plaintiff permitted to make a filing entry of the same in said land office, and that plaintiff had been obliged and compelled, on account of said rejection of her said application, and for aforesaid other reasons, to wait until the filing [19] of the plat of survey before she was permitted by the land department to make a filing therefor. Plaintiff further stated in said affidavit that in carrying out the provisions of the desert land law she has built, and built prior to March 28, 1908, a system of ditches for the irrigation of said land, and had prior to March 28, 1908, so arranged the same that it was capable of covering the entire tract of land claimed by her, and further that if plaintiff's application to file on said land, filed May 15, 1909, be changed or amended in any respect to the description of any of the land, plaintiff will be compelled to lose a part of the land she has been in possession of, reclaimed and improved and applied for, as aforesaid, and the said action will cause a serious and heavy loss to plaintiff because of the necessity of altering the plan of irrigation of said land, which was then in successful operation; that plaintiff having taken said land in good faith and having effected a reclamation thereof, so far as she was able and permitted, has acquired a vested right therein, and had ever since first taking possession, and in which vested right she should be protected to the full extent of the law, and as to the tract of land, parts of which she had applied for, have been segregated from the public

domain for the benefit of the claimant, plaintiff asked that if necessary a further segregation be ordered to allow plaintiff to enter the land reclaimed and improved by her without loss, which otherwise would occur, for reasons theretofore stated in said affidavits, and that in any case she be permitted to file upon the land of which she took possession and for which she then applied. At the time of filing the declaration or application aforesaid, plaintiff also filed a map of said land which exhibited a plan showing the mode of contemplated irrigation thereof, and which plan of irrigation was sufficient to thoroughly irrigate and reclaim said land and to prepare it to raise ordinary agricultural [20] crops, and which plan also showed the source of the supply of water to be used for irrigation and reclamation. Plaintiff filed with said application the supporting affidavits of herself, corroborated by John W. Hart and Rachael Hart, as to the proof of the facts set forth in her said application. Plaintiff at the time of filing her said application paid to the Register and Receiver, as the initial payment on said entry, the sum of $74.84, being twenty-five cents for each acre of land embraced in said application.

May 15, 1909, and when said application of the plaintiff was filed, the same was rejected upon the grounds that a portion of the land included in said application was described as the south half of tract 115, and that, under the order of the Commissioner of the General Land Office, entries could not be permitted of a part of a tract as designated on said survey, but thereafter said general order was re-

voked by the Commissioner of the General Land Office, and said Register and Receiver were ordered to accept applications to portions of tracts. On May 21, 1909, plaintiff appealed to the Commissioner of the General Land Office from the action of said Register and Receiver rejecting said application made on May 15, 1909. Upon and according to her information and belief, plaintiff alleges that no action was ever taken on said appeal.

17. Thereafter an order or orders were made by the Commissioner of the General Land Office directing and requiring that where conflicting entries had been made of any of the land embraced in said resurvey during the period of ninety days after the filing of the plat of resurvey thereof, that hearings be had to determine the respective rights of entry of applicants under said Act of March 3, 1877, and the Acts amendatory thereof, and of section 1 of said Act of March 28, 1908. [21]

18. Pursuant to orders, a hearing was ordered to determine the respective rights of plaintiff and defendant under their aforesaid desert land entry applications, to wit, the application of defendant filed March 1, 1909, and the application of plaintiff filed May 15, 1909, before the Register and Receiver of the United States Land Office at Los Angeles. Notice of said hearing was given the respective parties, and January 25, 1912, plaintiff and defendant appeared before said Register and Receiver and a hearing was had and evidence introduced by the respective parties. The evidence taken on said hearing showed, without conflict, that November 8, 1906,

when defendant took possession of said tract 113, the plaintiff was, and had been since February 1, 1906, in the actual and exclusive possession of said tracts 113 and 114 and the south half of said tract 115, and that plaintiff had, in good faith, commenced and continued to prosecute the reclamation thereof, as hereinbefore alleged. It was stipulated on said hearing that the evidence introduced by the respective parties on the trial of said action in the Superior Court of the county of Imperial, in which plaintiff herein was plaintiff and defendant herein was defendant, be considered and treated as in evidence on said hearing, and that the judgment-roll in said action be so considered and treated as in evidence on said hearing. It was further shown, without conflict, by the evidence introduced on said hearing that, after plaintiff was restored to the possession of said property by the sheriff of Imperial county, as hereinbefore alleged, she had been in the continuous occupation and actual possession of said tract 113, and had continuously prosecuted work for the reclamation thereof. Thereafter, to wit, April 29, 1912, said Register and Receiver decided said contest in favor of defendant, and held and decided that said desert land application of the [22] defendant for said tract 113 should be allowed, and that the plaintiff's application for said tract should be rejected, but that the application and entry of plaintiff as to said tract 114 and the south half of said tract 115 should be allowed.

19. May 28, 1912, the plaintiff took an appeal from said decision of said Register and Receiver to

the Commissioner of the General Land Office, and thereafter, to wit, December 7, 1912, the Commissioner of the General Land Office reversed said decision of the Register and Receiver, and decided and ordered that the application of the defendant be rejected and that plaintiff be allowed to complete and perfect her entry of said tract 113. January 3, 1913, the defendant filed his notice of appeal from said decision of the Commissioner of the General Land Office to the Secretary of the Interior, whereby he appealed from said decision of said Commissioner.

Notwithstanding there was no conflict in the evidence, or dispute as to the facts, with respect to the actual possession, reclamation and occupation by plaintiff of said tract 113, as hereinbefore alleged; and notwithstanding the judgment of the Superior Court of the county of Imperial in said action in which plaintiff herein was plaintiff and defendant herein was defendant, determining and adjudging that plaintiff was so in the actual and undisputed possession and entitled to the possession thereof on November 8, 1906, the date on which, as aforesaid, defendant claimed to have made settlement thereon; and notwithstanding it appeared from the evidence, without conflict, that July 17, 1907, plaintiff was in the undisputed actual possession and occupation of all of the land described and embraced in her application and described in the judgment in said action, except that part thereof from which plaintiff had been wrongfully ousted and ejected by defendant, as hereinbefore alleged, and notwithstanding that it appeared that plaintiff had filed [23] her applica-

tion, within ninety days after the filing in the local land office of the plat of the resurvey of the township in which said land was located, as hereinbefore stated; and notwithstanding it appeared from the evidence, without conflict, and was stated by the Secretary of the Interior in his decision, that the lands in controversy had been given by the Land Department the status of unsurveyed lands pending their survey under said Act of July 1, 1902, and notwithstanding the action of the Register and Receiver in rejecting the aforesaid application of defendant of July 17, 1907, had been affirmed on appeal by the Commissioner of the General Land Office, as hereinbefore alleged; the Secretary of the Interior, August 5, 1913, decided and held that said Act of March 28, 1908, had no application to said lands; that prior to the passage of said Act of March 28, 1908, no desert land right could be maintained upon lands, surveyed or unsurveyed, except by the filing of an application; that it appeared and was shown that the required description in an application for land by the old survey was an impossible condition, and a description by metes and bounds the only feasible one; that defendant's first application was made by metes and bounds, and was in fact a proper application, and, but for the mistaken requirement of the Land Department that in such applications the land should be described as near as possible in accordance with the survey of 1856, should have been allowed; that defendant was the first in right, by reason of being the first in the filing of a proper application, both pending the resurvey of said lands and after the

filing of the resurvey plat; and that, therefore, the application of defendant should be allowed, and that of plaintiff rejected, as to said tract 113.

Thereafter plaintiff filed a petition for rehearing with said Secretary of the Interior within the thirty days allowed by law, and on the 30th day of October, 1913, the Secretary [24] of the Interior denied said motion for a rehearing. Thereafter the plaintiff filed a motion with said Secretary of the Interior to exercise supervisory authority and allow plaintiff to make entry upon said tract 113. Thereafter, on the 20th day of October, 1913, the said Secretary of the Interior denied said motion to exercise supervisory authority.

20. March 4, 1914, the defendant completed his entry in accordance with the decision of said Secretary of the Interior, and said entry of defendant was allowed by the Register and Receiver of the local land office as to said tract 113, and the required payments were made and the Receiver of said land office issued his receipt for such payments. Such proceedings were thereafter had that September 25, 1916, said defendant filed his notice of intention to make final proof under said entry with the Register and Receiver of the United States Land Office at El Centro, California (in which district said land was then situated), and thereafter notice was issued by said Register and Receiver that final proof would be made before said Register and Receiver on the 28th day of November, 1916, and the same was published as required by law. That on November 27, 1916, plaintiff filed with said Register and Receiver a contest

against the entry of said defendant, upon the following grounds, to wit:

That the said Joseph W. Cox had not made the required expenditure of $1.00 per acre each year since date of entry towards the reclamation of said land, or at any time, and that he had made no expenditure whatever towards the ultimate reclamation of said land.

That the foregoing described entry of Joseph W. Cox was invalid, in that it was erroneously and improperly allowed, the contestant, Ethel Hart, having been in possession and engaged in the reclamation of said land and being qualified to make [25] entry thereof at the time said Joseph W. Cox first asserted claim thereto, and at the time his said entry was initiated and at the time it was allowed; that the said Ethel Hart was the first to take possession of said land and commence the reclamation thereof, and was engaged in the work of reclamation of said land when the said Joseph W. Cox first attempted to take possession and make entry thereof.

That the said Ethel Hart, being at all times herein mentioned, and now, qualified to make entry under the desert land laws of the United States, went upon said land and took actual possession thereof, about February 1, 1906, with the intent and purpose to reclaim the same under the provisions of the desert land laws, and that she commenced the work of reclamation thereof; that thereafter and until on or about the 8th day of November, 1906, she continued in the actual possession of said land, and on said last-mentioned date the aforesaid Joseph W. Cox clandes-

tinely, forcibly and unlawfully took possession of said land and continued in possession thereof until February, 1909, when said Joseph W. Cox was dispossessed by a writ of possession issued out of the Superior Court of the county of Imperial, State of California, in an action wherein the said Ethel Hart was plaintiff and the said Joseph W. Cox was defendant, which said action was one in ejectment brought to recover possession of said land; and a judgment was rendered and entered in said action by said Superior Court on February 10, 1909, in favor of the plaintiff, Ethel Hart, and against the defendant therein, Joseph W. Cox, that said Ethel Hart do have and recover of and from said Joseph W. Cox possession of the premises herein referred to, and which judgment was thereafter, on the 22d day of November, 1915, affirmed by the Supreme Court of the State of California (171 Cal. 364); that ever since February 10, 1909, said Ethel Hart had remained and still was in the actual and exclusive possession of [26] all of said land and had never abandoned the same; that she had made more than the expenditure of $3.00 an acre required by law towards the reclamation of said land; that she had acquired a water right for the reclamation of said land; that she had reclaimed and cultivated to crops the entire area of said land for more than seven years preceding the date of this contest; that she had paid all state, county and other taxes on said land for eight years preceding the date of this contest; that she was then in the undisturbed possession of said land and had fully reclaimed the same so as to entitle her to make entry

and final proof of, and to receive patent to, said land.

That the said entry of said Joseph W. Cox was invalid for the further reason that said Joseph W. Cox had done no act to entitle him to make entry and final proof of said land and to receive patent thereto; that he had never performed any work or made any expenditure towards the ultimate reclamation of said land; that he had not been in possession of said land, or any part thereof, since February 10, 1909, that he had never irrigated or cultivated said land; and that he had done nothing whatever upon said land towards its reclamation, cultivation or improvement since the date of entry, and had wholly abandoned said land and had exercised no act of ownership with respect thereto since date of entry.

That the said entry of Joseph W. Cox was not made in good faith, as shown by the foregoing allegations, but that he was merely holding his claim thereto for speculative purposes, in case he should succeed in clearing the record of other claims.

That said Ethel Hart was entitled to make entry of said lands by reason of her prior and better right thereto, and by reason of the lack of good faith, right, possession and reclamation of said Cox.

And November 28, 1916, defendant appeared before said [27] Register and Receiver of the United States Land Office at the city of El Centro, California, at the office therein, and offered to make final proof of said entry. At the time said defendant offered to make such final proof, upon the following grounds, to wit:

That the said Joseph W. Cox did not own and con-

trol, or have a clear right to, the use of water sufficient to irrigate the whole of said land and to keep the same permanently irrigated.

That the said Joseph W. Cox had not constructed ditches on said land for the irrigation thereof; and that he had not provided any means whatever for conducting water to and over said land.

That said Joseph W. Cox had not made the expenditure of $3.00 an acre towards the reclamation of said land, in compliance with the legal requirements.

That said Joseph W. Cox had not conducted water upon said land with a view to the proper reclamation thereof.

That the said Joseph W. Cox had not cultivated said land by actual tillage of the soil or by the planting of crops.

That the said Joseph W. Cox had not planted or produced an agricultural crop or any crop on one-eighth of the area of said land, or any part thereof.

That the said Joseph W. Cox had not reclaimed said land.

That the said Joseph W. Cox had not performed any act which entitled him to make final proof of said land.

Thereupon defendant, for the purpose and with the intent to mislead and deceive said Register and Receiver, and well knowing that he had not reclaimed said land or conducted water thereon or irrigated the same or raised any crops thereon, [28] and for the purpose of securing the title to said land without having conducted water thereon for irrigation or otherwise reclaimed the same, and to induce said

Register and Receiver, and other officers of the Land Department charged with the disposition of said lands, to believe that he had irrigated, reclaimed, and produced crops on, said land,—presented to said Register and Receiver his final proofs by his own affidavit and the supporting affidavits of two witnesses. In his said proofs defendant deposed and stated, among other things, that he owned and controlled a clear right to water sufficient to properly and permanently irrigate all the irrigable lands for which proof was made; that water had been conducted upon said land so as to irrigate and reclaim the same from its former condition to such an extent that it would produce an agricultural crop; that ditches had been constructed of sufficient capacity to carry water to each legal subdivision of said lands; that he had expended more than $3.00 per acre towards the ultimate reclamation of said lands; that he had seen water distributed through and by means of the ditches on said land over all the irrigable area on each legal subdivision thereof; that said land had been cultivated by actual tillage of the soil and paying crops produced thereon. In the affidavits of the said supporting witnesses, they deposed to and made the same statements. Defendant did not, nor did either of his said supporting witnesses, in said proofs state that the water therein referred to had been conducted upon said land by defendant, or that any of the ditches therein referred to had been constructed by defendant. Nor was it stated in said proofs that the actual tillage of the soil on said lands mentioned therein had been done or performed by defendant,

or that the paying crops in said proof mentioned had been raised or produced by defendant. Plaintiff alleges that, in truth and in fact, defendant did not, at any time, own or control a clear, or any, water right [29] sufficient to properly or permanently irrigate all or any of said land which was irrigable; that defendant had not conducted upon said land water to irrigate or reclaim the same from its former condition, nor had he constructed any ditches or system of ditches thereon, or any other means of conducting water upon any portion of said land for the irrigation thereof; nor had he expended $3.00 per acre, or any other sum, towards the ultimate reclamation of said land. Plaintiff alleges that defendant had not constructed ditches and a system of irrigation to all or any part of said land; that said lands had not been irrigated by defendant at his own expense, nor had he caused it to be done; that he had not cultivated said land, or any part thereof, or planted or produced any crops thereon. Plaintiff alleges that the only ditches or system of ditches on said land at the times mentioned in said proofs were the ditches and system of ditches constructed thereon by plaintiff; that the only water conducted on said land for the purpose of irrigating the same was the water conducted thereon by plaintiff, and that the only crops produced thereon were the crops produced thereon by plaintiff,—all as hereinbefore alleged.

At the time fixed in said notice for hearing the final proofs of defendant, to wit, November 28, 1916, plaintiff appeared before said Register and Receiver in support of her said contest, and then and there re-

quested and demanded of said Register and Receiver to be allowed to cross-examine defendant and his said witnesses as to the matters set forth in their respective affidavits; but said Register and Receiver refused to allow or permit plaintiff to cross-examine defendant or either of his said witnesses, or to otherwise participate in said proceedings, either in support of her aforesaid contest or her said protest. Thereupon said Register and Receiver received said proofs of defendant and suspended said proofs pending further consideration of [30] the contest of plaintiff; thereafter, to wit, December 28, 1916, plaintiff took an appeal to the Commissioner of the General Land Office from the action of said Register and Receiver so refusing to permit her to cross-examine the defendant and his witnesses upon the taking of said final proofs. Thereafter, to wit, January 27, 1917, defendant filed a motion with said Register and Receiver to dismiss said contest of plaintiff, on the ground that the question raised therein had already been adjudicated by the decision of the Secretary of the Interior, hereinbefore referred to, dated August 5, 1913. Thereupon such proceedings were had that on March 20, 1917, said Register and Receiver sustained the motion of the defendant to dismiss said contest, and made an order dismissing the same. April 20, 1917, plaintiff took an appeal to the Commissioner of the General Land Office from said order and ruling of said Register and Receiver dismissing said contest. Thereafter, to wit, August 9, 1917, the Commissioner of the General Land Office remanded the case for hearing before said Register

and Receiver as to the facts alleged in said contest to have occurred subsequent to the aforesaid decision of the Secretary of the Interior dated August 5, 1913. Thereupon, to wit, September 18, 1917, plaintiff took an appeal from said decision of the Commissioner of the General Land Office to the Secretary of the Interior. Such proceedings were thereupon had that the Secretary of the Interior, by decision dated November 7, 1917, sustained the action of the Register and Receiver in dismissing the aforesaid contest of plaintiff. Thereafter, to wit, May 23, 1918, the Commissioner of the General Land Office, notwithstanding he had rendered no decision on the protest of plaintiff against the final proof of defendant and the appeal of plaintiff taken therefrom, approved the aforesaid final proofs of defendant and directed that a final certificate be issued thereon to defendant; and such final certificate was issued to defendant [31] June 24, 1918. Thereafter, to wit, October 24, 1918, letters patent were issued by the United States to defendant for said land.

21. Plaintiff alleges that the Secretary of the Interior in his said decision of August 5, 1913, misconstrued and misconceived the law in the following particulars: (a) In holding that defendant was entitled to enter said land when it appeared that plaintiff was, at the time defendant entered upon said land, in the undisputed actual possession and occupation thereof, and claiming the right to enter the same under said Act of March 3, 1877, and the amendments thereto; (b) in holding and deciding that said land did not occupy the status of unsurveyed land up to

the time the approved plat of the resurvey thereof was filed in the local land office; (c) in holding that the application of plaintiff, filed within ninety days after the filing in the local land office of the plat of the resurvey of the township in which said land is located, did not give her the preference right to enter the same; (d) in holding that defendant was entitled to enter said land under his application of July 17, 1907, notwithstanding said application had been rejected by the Register and Receiver of the local land office, and that such action of the Register and Receiver had been affirmed on appeal by the Commissioner of the General Land Office; (e) in holding and deciding that said Act of March 28, 1908, was not retroactive and had no application to said lands; (f) in holding that defendant was the first in right, by reason of being the first in time of the filing of a proper application; (g) in holding that the application of defendant should be allowed, and that of plaintiff rejected, as to said tract 113. Plaintiff further alleges that the Commissioner of the General Land Office and the Register and Receiver of the local land office, in all proceedings had before them subsequent to the rendition of said [32] decision by the Secretary of the Interior, misconceived and misconstrued the law in each of the particulars in which the Commissioner so misconstructed and misconceived the same. Plaintiff further alleges that the Register and Receiver of the local land office misconceived and misconstrued the law in dismissing the contest of plaintiff and in holding that the questions raised therein had been adjudicated by the de-

cision of the Secretary of the Interior dated August 5, 1913, and the Secretary of the Interior misconceived and misconstrued the law in sustaining the action of the Register and Receiver in dismissing said contest of plaintiff. Plaintiff further alleges that the Commissioner of the General Land Office misconceived and misconstrued the law in holding and deciding that the aforesaid proofs of defendant were sufficient in form or substance, in that same failed to show that acts of cultivation, conducting of water on said land, raising crops thereon, and the other acts of reclamation referred to in said proofs, were done or performed by defendant. Plaintiff further alleges that the Register and Receiver of the local land office and the Commissioner of the General Land Office were imposed upon, misled and deceived by the false proofs made by defendant, as hereinbefore alleged, whereby they were induced to believe, and did believe, that defendant had acquired a water right, constructed ditches and a system of ditches on said tract of land, and had irrigated, cultivated, improved and reclaimed the same, as in said proofs stated and set forth.

Plaintiff further alleges that, but for the misconstruction and misconception of the law by the Secretary of the Interior, the Commissioner of the General Land Office and the Register and Receiver of the local land office, as hereinbefore alleged, and but for the false and misleading statements made in the proofs of defendant, as hereinbefore alleged, the application of defendant to enter said tract 113 would have been denied, [33] and plaintiff's application

to enter the same would have been allowed, and, upon the making of her final proofs, as required by law, a patent would have been issued to her.

WHEREFORE plaintiff prays that it be declared and adjudged that plaintiff is the equitable owner of said tract No. 113, that defendant holds the legal title thereto in trust for plaintiff, and that defendant has no beneficial interest therein; that defendant be required to convey the same to plaintiff, and that, upon his failure to make such conveyance, the Court appoint a commissioner to execute the same; and for such other and further relief as may be meet and agreeable to equity, and for costs.

GEORGE H. P. SHAW,
226 Stimson Building,
Los Angeles, Cal.,
HUNSAKER, BRITT & EDWARDS,
By WM. J. HUNSAKER,
1131 Title Insurance Building,
Los Angeles, Cal.,
Solicitors for Plaintiff. [34]

[Endorsed]: D. 110—Eq. Original. No. ——. In Equity. In the United States District Court, Southern District of California, Southern Division. Ethel Hart, Plaintiff, vs. Joseph W. Cox, Defendant. Bill to Declare a Trust as to Real Property, and to Obtain a Decree Requiring Defendant to Convey the Legal Title Thereto to Plaintiff. Receipt of a copy of the within is hereby admitted this —— day of November, 1918. ————, Attorney for ———. Filed Nov. 8, 1918. Chas. N. Williams, Clerk. By R. S. Zimmerman, Deputy

Clerk. George H. P. Shaw, Hunsaker, Britt & Edwards, 1131–1143 Title Insurance Bldg., Fifth and Spring Streets, Los Angeles, Cal., Attorneys for Plaintiff. [35]

In the District Court of the United States, in and for the Southern District of California, Southern Division, Sitting at Los Angeles.

IN EQUITY—No. D. 110.

ETHEL HART,

Plaintiff,

vs.

JOSEPH W. COX,

Defendant.

Amendment to Bill of Complaint.

Now comes the plaintiff, before the defendant has responded to the original bill herein, and amends her bill of complaint as follows:

On line 4, page 31, and immediately preceding the prayer thereof, insert the following:

22. The land the title to which is involved in this suit is of the value of $20,000.00, and the amount in controversy in this suit, exclusive of the interest and costs, exceeds the sum or value of three thousand dollars.

Dated November 12, 1918.

GEO. H. P. SHAW,
HUNSAKER, BRITT & EDWARDS,
By WM. J. HUNSAKER,
Solicitors for Plaintiff. [36]

[Endorsed]: Original. No. D. 110—Equity. In the United States District Court, Southern District of California, Southern Division. Ethel Hart, Complainant, vs. Joseph W. Cox, Defendant. Amendment to Bill of Complaint. Receipt of a copy of the within is hereby admitted this —— day of ——, 191—. ———, Attorney for ———. Filed Nov. 12, 1918. Chas. N. Williams, Clerk. By R. S. Zimmerman, Deputy Clerk, George H. P. Shaw, Hunsaker, Britt & Edwards, 1132–1143 Title Insurance Bldg., Fifth and Spring Streets, Los Angeles, Cal., Attorneys for Plaintiff. [37]

In the District Court of the United States, in and for the Southern District of California, Southern Division, Sitting at Los Angeles.

IN EQUITY—No. D. 110.

ETHEL HART,

Plaintiff,

vs.

JOSEPH W. COX,

Defendant.

Answer.

Comes now the defendant in the above-entitled cause and, answering the bill of complaint, herein, denies and alleges as follows:

I.

Defendant denies that the plaintiff herein was at all times in her bill herein mentioned over the age of twenty-one years, but, on the contrary, alleges that

at the time the said plaintiff first laid claim to the said land in the said bill described, and until the —— day of January, 1907, the said plaintiff was under the age of twenty-one years.

II.

Defendant denies that the said land was after November 8th, 1906, unoccupied, unimproved or unappropriated by any person claiming the same other than the plaintiff, but alleges that on the said 8th day of November, 1906, the defendant entered upon the one hundred sixty (160) acre tract of land described in the bill of complaint herein as Tract One Hundred Thirteen (113), and proceeded to and continued to improve and occupy the same until on or about February 12th, 1909, at which time defendant was ousted from said land by the sheriff of Imperial County at the instance of the plaintiff herein.

III.

Defendant denies that the plaintiff on February 1st, 1906, [38] or at any other time prior to February 12th, 1909, took possession of the said Tract No. 113 in township fourteen (14) south, range fifteen (15) east, S.B.M., or of any part or parcel thereof. Defendant further denies that the plaintiff entered into possession of the said Tract No. 113, or any part or parcel thereof, on February 1st, 1906, or at any time prior to February 12th, 1909, or that she at that time, or any time prior to February 12th, 1909, began the reclamation of said land, or that it was at all, or any time thereafter, the intention of the plaintiff in good faith to reclaim said land, or any part thereof, or make final proof thereof, and

defendant denies that the plaintiff on February 1st, 1906, or at any other time prior to February 12th, 1909, entered into possession of the tract of land described in the Complaint, known as Tract No. 113, in township 14 south, range 15 east, S.B.M., or of any part or parcel thereof, or of any part of the three hundred twenty (320) acre tract described in the plaintiff's bill of complaint, except the southeast quarter of such 320 acre tract, the same being known as Tract 114 in said township.

IV.

Defendant has not sufficient information or belief to enable him to say whether or not on or about the 1st day of February, 1906, the plaintiff plowed a furrow upon the exterior boundary lines of said tract, or posted a notice upon said land stating that she had taken possession of the same, or intended to reclaim or enter said land under the provisions of said Desert Land Act, and therefor and upon that ground denies each and all of said allegations. Defendant alleges that long prior to the 1st day of February, 1906, to wit, in November, 1905, one J. W. Hart, the father of the plaintiff, at a time when the plaintiff was under the age of twenty-one years, posted a notice at several places upon the said land to the effect that the said plaintiff claimed the said land. Defendant denies that on or about the 1st day of February, 1906, or any other time [39] prior to February, 1909, the plaintiff commenced the work of releveling, bordering or ditching the said land, or so as to place said land in condition for the planting of a crop, or the irrigation of the said land, or of

any part or parcel of said land, except the said Tract Number 114, and denies that the plaintiff plowed or constructed any ditch along the east line of said tract, except along the east line of said Tract No. 114.

V.

Defendant denies that at the same time, or any time prior to February, 1909, the plaintiff leveled, bordered or ditched about five (5) acres, or any acres, of said land adjoining said eighty-five (85) acres, or adjoining the said Tract No. 114 upon the west, but admits that the plaintiff did a small amount of work upon about three (3) acres of land lying immediately west of said Tract No. 114, and partially leveled the same and threw up some slight borders, but alleges that the said work was insufficient to prepare the said three (3) acres, or any part thereof, for cultivation, and that the plaintiff thereafter sowed some barley upon the said three (3) acres, and that the same failed to grow to maturity or to mature, and thereupon the plaintiff abandoned the same and enclosed the said eighty (80) acres, known as Tract No. 114, with a barb-wire fence. Defendant admits that after the said 80 acres in Tract No. 114 was planted to barley the plaintiff procured and conducted water to and upon the said 80 acres and that she thereupon irrigated the said barley repeatedly and produced a crop thereupon, and defendant admits that during the time when the said 80 acres of land was irrigated that on two occasions the plaintiff allowed waste water to run from the said 80 acres on to the said three acres lying west thereof in quantities sufficient to sprout the said barley upon

the said three acres, but not in sufficient quantities to mature the same or produce a crop thereon, but defendant denies that she otherwise irrigated [40] any barley or land outside of the said Tract No. 114 at any time prior to February, 1909.

VI.

Defendant denies that the plaintiff fenced said 85 acres mentioned in her complaint, or any 85 acres, or any land whatever, except the said 80 acre tract known as Tract No. 114.

VII.

Defendant denies that during the first days of November, 1906, or prior to the 8th day of November, 1906, or at any time, plaintiff constructed a head ditch, or any ditch, on the east side of the west half of the said entire 320 acre tract, or along the east line of the said tract designated as Tract No. 113, or at any place on the said Tract No. 113, or at any place where such ditch could be used for the irrigation of said Tract No. 113.

VIII.

Defendant denies that during the first days of November, 1906, or prior to the 8th day of November, 1906, or at any time prior to the 12th day of February, 1909, the plaintiff commenced plowing the said land other than the said Tract No. 114, or any part or parcel thereof, for the purpose of constructing borders for the irrigation of said land on the south half of the west half of said entire tract, or any part or parcel thereof, and defendant denies that the plaintiff put up flags upon the south half of said Tract No. 113 for the purpose of marking the lines

so as to do the plowing for the construction of borders thereon, or otherwise.

IX.

Defendant denies that upon November 8th, 1906, or at any other time while plaintiff was in the possession or occupation of said entire tract of land, or of any part of the said Tract No. 113, or as stated in the complaint herein, or during plaintiff's temporary absence, defendant entered upon or took possession of the west half of said entire tract, or any part or parcel thereof, or ousted or ejected the plaintiff therefrom, but defendant alleges [41] that on the 8th day of November, 1906, the said Tract No. 113 and all thereof, was entirely unoccupied, and that upon said date defendant entered into the possession and occupation of said tract or land with the intention of thereafter making entry of the same under the land laws of the United States, and of reclaiming the same from its desert condition.

X.

Defendant admits that the proceedings were had in the Superior Court of the county of Imperial, and in the Supreme Court of the State of California, which were set out in the bill of complaint herein, were had as alleged in said bill of complaint, but defendant alleges that at the time such proceedings were commenced in the Superior Court of the county of Imperial, and at the time the said cause was tried in the said Superior Court aforesaid, proceedings were pending in the Land Department of the United States on behalf of both plaintiff and defendant herein for the entry and purchase of the said Tract No.

113 from the Government of the United States, and that such proceedings were continuously pending in the said Land Department of the United States at all times between July 17th, 1907, and the date of the issuing of the patent to the defendant, as set out in the bill of complaint herein; and that during all of such times the said Land Department of the United States had jurisdiction of the said matter and of the determination of the controversy between the plaintiff and the defendant relative to the said land, and to the possession and the right of possession thereof, and to the right to purchase the same from the Government of the United States, and that the said Superior Court of the County of Imperial had no jurisdiction at any time to determine the right or title, or right of possession, to said lands as between the plaintiff and defendant and that neither the determination of the said Superior Court nor that of the Supreme Court of the State of California was or is [42] binding upon the Land Department of the United States or upon the defendant.

XI.

Defendant admits that he did not during the time that he excluded plaintiff from the possession thereof completely reclaim the said land, or any part thereof, by conducting water thereon, but denies that he has not at any time commenced the reclamation of said land in good faith or at all, and, on the contrary, defendant alleges that immediately upon taking possession of said land in November, 1906, he in good faith commenced the reclamation of said land and diligently proceeded with the said work of reclamation until ousted therefrom in February, 1909,

as set out in the plaintiff's bill of complaint herein. That before being ousted therefrom the defendant constructed a ditch along the east line of said land for the convenient irrigation of all thereof, and leveled, bordered and prepared for cultivation more than fifty (50) acres thereof, and would have entirely finished the reclamation of said land if he had not been prevented by his being ousted therefrom at the instigation of the plaintiff.

XII.

That after the defendant's entry of said land was allowed, as stated in the complaint herein defendant at an expense of more than two thousand ($2,000.00) dollars, purchased and secured a water right sufficient for the practical irrigation and reclamation of all of said land. That upon being placed in possession of said land by the sheriff of Imperial County, as in the complaint stated, the plaintiff, making use of the ditches and other work so made and constructed by the defendant, and using the water rights so owned by the defendant, planted all of said land to crops and irrigated the same and at the time the defendant made final proof and payment for said land, all of said land had been reclaimed by virtue of defendant's said water rights, and the ditch aforesaid so constructed by the defendant.

XIII.

Defendant denies that at all times subsequent to February 1st, 1906, the plaintiff has been in the actual possession and [43] occupation of the east half of the said tract of land, cultivating or reclaiming the same, but alleges that between February 1st, 1906, and

February, 1909, one Ben Shank was in the actual possession and occupation of the north half of the east half of said 320 acres of said land, claiming the same as his own.

XIV.

Defendant denies that during the year 1909, or after plaintiff was put into possession of the said west half of the said tract by the sheriff of Imperial County, or at any other time, the said west half of said land was leveled, bordered or ditched by the plaintiff for the purpose of irrigating the same, or any part thereof, but alleges that said land was completely ditched and more than fifty (50) acres thereof leveled and bordered and made ready for cultivation by the defendant prior to February 12th, 1909. And the said plaintiff in irrigating the said land after February 12th, 1909, used the ditch constructed by defendant, and the water right of the defendant and irrigated said land with water owned by the defendant.

XV.

Defendant denies that on March 31st, 1906, or at any other time, the Commissioner of the General Land Office by telegram, or otherwise, made the direction or order set out in Paragraph 8 of the plaintiff's bill of complaint, or that after March 31st, 1906, or until the completion, approval or filing of the plat of resurvey, said land were treated or regarded by the Commissioner of the General Land Office or the Register or Receiver of the Local Land Office as having the status of unsurveyed land under suspension, but defendant admits that on or about March 31, 1906,

the Commissioner of the General Land Office promulgated an order in which he declared that the said lands occupied the status of unsurveyed land and forbade the allowance of any entry of said lands, except such entry as might be lawfully made for unsurveyed lands. [44] Defendant denies that by telegram, or otherwise, the Commissioner of the General Land Office on March 31, 1906, or at any other time, directed the Register and Receiver at Los Angeles, California, to suspend entries in township 14 south, ranges 14 or 15 east, S. B. M., or any part thereof other than homestead entries or other entries which might not lawfully be made for unsurveyed lands, and defendant denies that all or any applications for desert land entries were required to set forth or describe the land as nearly as possible according to the said survey of 1856.

XVI.

Defendant denies that after March 1st, 1906, at any time the said lands were treated or regarded by the Commissioner of the General Land Office or by the Register or Receiver of the Local Land Office as having the status of unsurveyed land under suspension, but admits that they were by the said Commissioner and by the said Local Land Office regarded as having the status of unsurveyed land.

XVII.

Defendant denies that on or about February 1st, 1906, or at any time prior to May 15th, 1909, the plaintiff applied to the Register or Receiver of the United States Land Office at Los Angeles, California, to be allowed to enter said land, or any part thereof. De-

fendant denies that the plaintiff was advised by the said Register or Receiver, or by either of them, that she would not be allowed to make desert land entry of said lands, or that the only way in which she could protect her rights or secure a preference right to enter said land under the Desert Land Act was for her to remain in the possession thereof, or to continue the reclamation of the same until the filing of the plats of the resurvey of said land, or that then she would have or be entitled to a preference right to enter said land. Defendant denies that plaintiff relied or acted upon such information or advice. Defendant denies that thereafter the plaintiff was informed or [45] advised that if an application were made by her to enter said land under said Act, in which application the land should be described according to the original survey of 1856, it would be received and probably rejected, or that thereupon an appeal could be taken by her from such order or rejection to the Commissioner of the General Land Office. Defendant denies that plaintiff on July 30, 1907, or at any time prior to May 15, 1909, filed in said Local Land Office her desert land application to enter said entire tract, or any part thereof, under said Desert Land Act; but admits that on July 30, 1907, the plaintiff filed in the said Local Land Office at Los Angeles by an application to enter under the desert land law the lands described in lines 29 and 30 of paragraph IX, page 11, of the complaint herein. Defendant denies that at the time said application was filed there was no entry of record in the said land office affecting the land described as the northeast quarter of section

13, in township 14 south, range 14 east, S. B. M., but, on the contrary, defendant alleges that the said northeast quarter of section 13 was at that time embraced in the valid and subsisting desert land entry of one Jas. B. Hoffman. Defendant denies that the said description contained in her said application was a correct description of said land according to the said survey of 1856, or as near as it was possible to describe said lands, according to the said survey of 1856, or that same was a valid description of any of said land; and defendant denies that as a matter of fact said land was not included in any other valid entry, but alleges that the land so applied for by the plaintiff was included within the said valid entry of the said Jas. B. Hoffman.

XVIII.

Defendant alleges that on July 17th, 1907, the land now embraced in the said Tract 113 was public land of the United States, desert in character, unoccupied and not embraced within the lawful claim of any person whatever. That on said date the [46] defendant filed with the Register and Receiver of the United States Land Office at Los Angeles an application to enter lands now embraced in the said Tract 113, which said lands were in his said application then described as required by law, in view of the fact that the Department of the Interior then held that the said land occupied the status of unsurveyed lands, as follows:

> Commencing at a point 6280 feet south and 1134 feet east of a stake in township line between townships 13 and 14 S., R. 15 E., as marked on

the ground by U. S. surveyor A. A. Henderson, in the official resurvey of the exterior line of said township, which stake is marked to indicate common corner to sections

31 : 32

6 : 5

and running thence south 40 chains; thence west 40 chains; thence north 40 chains; thence east 40 chains, to place of beginning. Said point of beginning is also five miles and 2506 feet west from a point which, from its relation and bearing to Sunset Spring, as described in the field-notes of the original survey of said land made in 1856, is believed to be the common corner of sections

11 : 18

14 : 13

T. 14 S., R. 15 E., according to said original survey of 1856, containing 160 acres.

Defendant admits that the said application was rejected by the said Register and Receiver as alleged in the said bill of complaint herein, and that defendant appealed from the said action to the Honorable Commissioner of the General Land Office, and that the said Commissioner of the General Land Office on or about October 3d, 1910, affirmed the action of the Local Land Office. Defendant admits that no appeal was taken from such order to the Secretary of the Interior, but alleges that in the meantime the plat of resurvey had been filed in the Local Land Office and affiant had been duly notified to make application for

said land under the new survey and to describe the said land according to the new survey as Tract 113 in said township 14 south, range 15 east. Defendant denies that upon the plat of resurvey of said township Tract 113 was designated as the northeast quarter of section 13, township 14 south, range 15 east, S. B. M., according to the survey of 1856, [47] and alleges that no attempt was made in the said resurvey to retrace the survey of 1856, and that the tracts numbered from 37 upwards and shown upon the maps of resurvey were simply the claim lines of settlers surveyed out according to lines actually claimed by them on the grounds and designated in a claim supplement filed in connection with the said plats of survey according to any description by which the same might be claimed or might be understood to be claimed by the local deputy surveyor making such survey in the field.

The defendant does not know by what description the lands now known as Tract 113 were known or described by the survey of 1856, and is therefore unable to say whether or not his previous application so made on July 17th, 1907, included any lands in the northeast quarter of section 13, township 14 south, range 14 east, S. B. M., but alleges that as nearly as he is able to discover, ascertain or estimate the said lands now described as Tract 113, constituted the northwest quarter of section 14 in township 14 south, range 14 east, S. B. M., by the aforesaid survey of 1856. Defendant denies that on July 30th, 1907, or at any other time prior to May 15th, 1909, the plaintiff made application in the regular form to file a

desert land entry on the land now embraced within Tract Number 113, in township 14 south, range 15 east, or any part or parcel thereof, and denies that the description contained in her application made on July 30, 1907, and being the northeast quarter of section 13, township 14, south, range 14 east, and the northwest quarter of section 18, township 14 south, range 15 east, S. B. M., was identical with, or described any part or parcel of the lands now embraced in the Tract 113. Defendant denies that the same was the best possible description that could be given without resurvey; and denies that the said lands were on July 30th, 1907, unsurveyed lands of the United States. [48]

Defendant admits that subsequent to May 5th, 1909, orders were made by the General Commissioner of the General Land Office, directing that where conflicting applications had been made for any of the land in said resurvey during the period of ninety days after the filing of the plat of resurvey that hearings be had to determine the respective rights of entry of applicants; but denies that any order was made that hearings be had to determine the rights of applicants under section I of the Act of March 28th, 1908.

XIX.

Defendant admits that a hearing was had in the United States Land Office at Los Angeles with respect to the rights of plaintiff and defendant to the said Tract 113, but defendant denies that the evidence taken upon the said hearing was without conflict, or at all, or that upon November 8th, 1906, when defendant took possession of said Tract 113 the plain-

tiff was or had been since February, 1906, or ever had been prior to February, 1909, in the actual or exclusive or other possession of said Tract 113, or of any part or parcel thereof; or that the plaintiff had in good faith, or otherwise, commenced to prosecute the reclamation thereof, or any part thereof. Defendant denies that it was shown by the evidence introduced upon the said hearing that after the plaintiff was restored to the possession of said property by the sheriff of said Imperial County, or otherwise, she had continuously, or otherwise, prosecuted work for the reclamation of said Tract 113, except as herein specially admitted, to wit, that she, by the use of the defendant's water right and ditches and water, had completed the reclamation of the said land which had been begun by the defendant. Defendant denies that it appeared from said evidence that on July 17th, 1907, or at any other time prior to 1909, plaintiff was in the undisputed or actual possession or occupation, or any occupation or possession of all or any of the land [49] embraced in the said Tract 113. On the contrary, defendant alleges that it duly appeared from the evidence introduced at the said hearing, and on said appeal presented to the said Secretary of the Interior, that on November 8th, 1906, the said Tract 113 was unoccupied desert land not lawfully claimed by any person. That on said last mentioned date the defendant entered upon and took possession of the said land so embraced in Tract 113, and commenced the reclamation thereof in good faith and continued thereafter to make entries under the desert land laws, and that he was at that time, and continued to be,

a qualified entryman of the desert land laws. Also that the defendant remained in the possession and occupation of the said land until February, 1909, at which time he was unlawfully ousted from said land at the instigation of the plaintiff herein. That it also appeared from the said hearing that the said defendant on July 17, 1907, and at a time when the said lands were open to desert land entry, had filed a good, sufficient and complete application to make entry of the land now embraced in said Tract 113, and had tendered payment for the said lands, as required by law, and that owing to the mistake of the Honorable Commissioner of the General Land Office the said application had been erroneously and illegally refused; and that after making the said application the said defendant continued upon said land and continued in good faith to carry on the work of reclaiming the same from its previous desert condition.

XX.

Defendant admits that on November 27th, 1916, the plaintiff filed with the Register and Receiver of the United States Land Office at El Centro, California, a pretended contest of the defendant's entry, set out in paragraph 20 of the plaintiff's bill of complaint, and that on the 28th day of November, 1916, she appeared before the said Register and Receiver and made protest against defendant's final proof, [50] but defendant alleges that each and all of the facts which the plaintiff sought by the said contest and protest to try and litigate had been previously tried and fully heard by the said Department of the Interior under and during the proceedings in the

plaintiff's bill of complaint herein set out. And that the said pretended contest and protest were only filed by the said plaintiff for the purpose of delaying the issue of a patent to the defendant herein, and of keeping the use and occupation of the lands in controversy by means of such delay. That in making the said final proof defendant did not pretend to have done anything upon the said land since February, 1909, and that what had been done by the defendant and the plaintiff prior to February, 1909, and in fact all that had occurred with respect to the said land prior to January 25th, 1912, had been fully shown to the Department of the Interior by evidence introduced at the hearing mentioned in paragraph 18 of the bill of complaint herein, which took place on January 25th, 1912, and upon the said hearing it had been admitted by and on behalf of the plaintiff that the plaintiff had prevented any further reclamation of the said land by the defendant since February, 1909, and upon said hearing it had been shown to the Land Department by the evidence introduced that the vary ditches by which and through which the said land was ultimately irrigated by the plaintiff were constructed and placed upon the said land by the defendant prior to February, 1909, and that sixty acres of the said land had been, by the defendant, leveled and bordered and was ready to receive the water from the said irrigation ditch at the time defendant was so ousted from said land at the instance of the plaintiff in February, 1909; and that it was likewise shown to the Department in said hearing that the defendant at the time when he was so ousted from the said land

in 1909 had a water right for the said land and was ready to [51] irrigate the same at the time when he was so ousted. That because of the fact that it manifestly appeared to the Register and Receiver of the Local Land Office, and to the Secretary of the Interior, that all of the matters alleged in said pretended contest and protest had been fully litigated, and also because of the fact that it duly appeared to the Secretary of the Interior from the plaintiff's refusal to accept the permission given by the decision of the Honorable Commissioner of the General Land Office that she have a hearing for the purpose of proving any facts occurring subsequent to August 5th, 1913, and from the other papers on file before the Honorable Secretary in connection with the said matter, including the plaintiff's so-called contest and protest, that the said contest and protest were not filed in good faith and solely for purposes of delay, the Secretary of the Interior on November 7th, 1917, dismissed the said contest and protest.

XXI.

Defendant further alleges, and he is informed and believes, and upon such information and belief he alleges that as the decision of the Secretary of the Interior of August 5th, 1913, the said plaintiff amended her said application and excluded from her said application the said Tract 113, and duly made desert land application for Tract 113, and the south half of Tract 115, in township 14 south, range 15 east, S. B. M., and made final proof and payment therefor, and received patent for such lands within her said entry.

Defendant alleges that in and by the said decision of the said Secretary of the Interior of August 5th, 1913, it was adjudicated, found and declared that at the time of the defendant's entry upon the said land on November 8th, 1906, the plaintiff was not in possession of the same, or any part or parcel thereof, and that thereafter she was not at any time in possession or occupation of any part or parcel thereof, until February, 1909, when [52] she was placed in possession thereof by the sheriff of Imperial County acting on her behalf; and it was further adjudicated, found and declared that the said lands were open to desert land entry July 17th, 1907, and that at that date the defendant filed an application in due and legal form, and that the same should have been accepted. That in and by the said decision it is further adjudicated, found and declared that the defendant was the first person to offer a proper valid application for the said land, and that he was legally entitled to make desert land entry thereof.

XXII.

Defendant denies that the Secretary of the Interior in his said decision of August 5th, 1913, or any other decision rendered by him with respect to the said matter, misconstrued or misconceived the law relative thereto, either in the particulars mentioned in paragraph 21 of the plaintiff's bill of complaint herein, or in any other particulars, or in any other respect whatever. Defendant denies that the Commissioner of the General Land Office, or the Register or Receiver of the Local Land Office, in all or in any proceedings had before them subsequent to the said

proceedings of the Secretary of the Interior, misconstrued or misconceived the law, or in the particulars claimed in paragraph 21 of the plaintiff's bill of complaint, or in any particular, or in any respect whatever. Defendant denies that the Register or Receiver of the Local Land Office misconceived or misconstrued the law in dismissing the contest of plaintiff, or in hearing that the question raised therein had been adjudicated by the decision of the Secretary of the Interior dated August 5th, 1913, or that the Secretary of the Interior misconstrued or misconceived the law in sustaining the action of the Register and Receiver in dismissing said contest of plaintiff, [53]

XXIII.

Defendant denies that the Commissioner of the General Land Office misconstrued or misconceived the law in holding or deciding that the aforesaid proofs of the defendant were sufficient in form or substance, or in any respect whatever, or in the respects mentioned in paragraph 21 of plaintiff's bill of complaint, or in any other respect. Defendant denies that the Register or Receiver of the Local Land Office or the Commissioner of the General Land Office were imposed upon, misled, or deceived by the false proofs, or any proofs, made by the defendant, or whereby they were induced to believe, or did believe, that defendant had acquired a water right, or constructed ditches, or a system of ditches, on said tract of land, or had irrigated, cultivated, improved or reclaimed the same as in said proofs stated, or set forth; but alleges that it was shown to and found by the Honorable Secretary

of the Interior from the proofs introduced and brought before him that prior to February, 1909, defendant had a water right for said land and had constructed ditches sufficient to completely irrigate all of said land, and had prepared sixty (60) acres of it by leveling and bordering so that the same was ready to irrigate, and that it was never shown by defendant's proofs at any time that he had personally conducted water upon the said land or irrigated the same, but on the contrary it was well known to the Register and Receiver of the Local Land Office and to the Commissioner of the General Land Office, and to the Secretary of the Interior, that plaintiff had not personally performed any act whatever upon the said land since February, 1909, but that he would have done so had he not been prevented by the unlawful occupancy of the plaintiff. That in none of the proofs made by the defendant was it stated or declared that the defendant had done anything personally with respect to the cultivation of crops upon the said land after February, 1909. [54]

XXIV.

Defendant denies that but for such alleged misconstruction or misconception of the law by the Secretary of the Interior, the Commissioner of the General Land Office, the Register and Receiver of the Local Land Office, or by all or any of them, or but for the false or misleading statements made in the proofs of defendant, or any false or misleading statement, the application of defendant to enter said Tract Number 113 would have been denied, or plaintiff's application to enter the same would have been allowed, or

that upon the making of her final proof, as required by law, a patent would have been issued to the plaintiff.

WHEREFORE, defendant prays that plaintiff take nothing by this action, and that the defendant be declared the legal owner and holder of the title to said land, and for such other and further relief as may be equitable, and for costs.

M. W. CONKLING,
Solicitor for Defendant.

CONKLING & BROWN,
Counsel.

State of California,
County of Imperial,—ss.

Joseph W. Cox, being duly sworn, deposes and says: That he is the defendant in the foregoing and above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters and things therein stated on his information and belief, and that as to those matters and things he believes it to be true.

JOSEPH W. COX.

Subscribed and sworn to before me this 18th day of December, 1918.

[Seal] JOHN A. BERRY,
Notary Public in and for the County of Imperial, State of California. [55]

[Endorsed]: D. 110—Eq.—In Equity. In U. S. District Court, Southern District of Cal. Ethel Hart, Plaintiff, vs. J. W. Cox, Defendant. Answer. Recd. copy this 21st day of Dec., 1918. George H. P.

Shaw, Hunsaker, Britt & Edwards, Attys. for Plff. Filed Dec. 21, 1918. Chas. N. Williams, Clerk. By R. S. Zimmerman, Deputy Clerk. M. W. Conkling, El Centro, Cal., Solicitor for Defendant. [56]

In the District Court of the United States in and for the Southern District of California, Southern Division, Sitting at Los Angeles.

IN EQUITY—No. D. 110.

ETHEL HART,

Plaintiff,

vs.

JOSEPH W. COX,

Defendant.

Final Decree.

This cause came on to be heard at the July, 1919, term, and was argued by counsel and submitted to the Court for decision; and thereafter, upon consideration thereof, it was and is hereby ORDERED, ADJUDGED AND DECREED as follows, viz.:

1. That plaintiff is the equitable owner of that certain piece or parcel of land situate in the county of Imperial, State of California, described as Tract No. 113, in township 14 south, range 15 east, S. B. B. and M., and for which a patent was issued by the United States to defendant October 24, 1918; that defendant holds the legal title to said land in trust for plaintiff, and that defendant has no beneficial interest or estate therein.

2. That defendant, within thirty days after the service of a certified copy of this decree on him or on his solicitor or attorney of record, do, and he is hereby required to, make, execute, acknowledge and deliver to plaintiff a conveyance sufficient in law to transfer and convey to plaintiff the legal title to said real property; and that, in the event of the failure of defendant to so make, execute, acknowledge and deliver such conveyance within the time aforesaid, the clerk [57] of this court be, and he is hereby, authorized and directed, in the name of, and for, defendant, to make, execute, acknowledge and deliver to plaintiff such conveyance.

3. That plaintiff have and recover of defendant her costs of this suit, taxed at the sum of $388.38.

Done in open court this 3d day of February, 1920.

OSCAR A. TRIPPET,
Judge.

Approved as to form, as provided in Rule 45.

M. W. CONKLING,
Solicitor for Defendant.

Decree entered and recorded this 3d day of February, 1920.

CHAS. N. WILLIAMS,
Clerk.
By Ernest J. Morgan,
Deputy Clerk.

[Endorsed]: Original. No. D. 110—In Equity.—In the United States District Court, Southern District of California, Southern Division. Ethel Hart, Plaintiff, vs. Joseph W. Cox, Defendant. Final Decree. Filed Feb. 3, 1920. Chas. N. Williams, Clerk.

By Ernest J. Morgan, Deputy Clerk. George H. P. Shaw, Hunsaker, Britt & Edwards, 1131–1143, Title Insurance Bldg., Fifth and Spring Streets, Los Angeles, Cal., Attorneys for Plaintiff. [58]

In the District Court of the United States, Southern District of California, Southern Division.

IN EQUITY—No. D. 110.

ETHEL HART,

Plaintiff,

vs.

JOSEPH W. COX,

Defendant.

Conclusions of the Court.

GEO. H. P. SHAW, Esq., and HUNSAKER, BRITT & EDWARDS, all of Los Angeles, California, for Plaintiff.

M. W. CONKLING, Esq., of El Centro, California, for Defendant.

This is a suit by the plaintiff to have the Court declare that the patent issued by the Government to the defendant, for certain lands, was erroneously issued; that the patent should have issued to the plaintiff. The plaintiff's claim is based upon the fact that the Department of the Interior erroneously decided a question of law, which, eventually, resulted in the patent being issued to the defendant.

The facts are fully stated and the proposition of law presented in this litigation and the contention of

the respective parties are fully set forth in the opinion of the assistant commissioner of the General Land Office hereinafter set out, and in the opinion of the assistant secretary of the Interior, reported in 42 L. D. 592.

The opinion of the assistant commissioner of the [59] General Land Office, deciding this controversy in favor of the plaintiff, was rendered on the 7th day of December, 1912, and is as follows:

> "By letter of September 4th, 1912, you transmitted the record in the above-entitled case, together with the appeal of Miss Ethel Hart from your decision adverse to her.
>
> The record shows that on March 1st, 1909, Joseph W. Cox filed desert land application No. 05545, for Tract 113, T. 14 S., R. 15 E.
>
> May 15th, 1909, Miss Ethel Hart filed desert land application No. 06196 for Tracts 113 and 114 and the S. ½ of tract 115, T. 14 S., R. 15 E.
>
> Oct. 13th, 1919, by office letter "G" a hearing was duly ordered.
>
> Pursuant to instructions you gave the parties notice of a hearing before you for January 25, 1912, at which they appeared in person and by counsel and submitted testimony.
>
> You found from the record that Cox first made an application for what is now tract 113, by metes and bounds, on July 17, 1907, which application was rejected, and on appeal such rejection was affirmed by office letter "G" of July 13, 1909, such decision afterwards becoming final.

It also appears that Miss Hart made application July 30, 1907, for the NE. ¼ sec. 13, T. 14 S., R. 14 E., and the NW. ¼, sec. 18, T. 14 S., R. 15 E., which application was rejected by your office November 7, 1907, because these lands were included in prior applications. An appeal was taken from such rejection and action thereon by this office was deferred awaiting the completion of the resurvey of said township, under the act of July 1, 1902 (32 Stat. 728). After the filing of the official plat of resurvey, both parties made application thereunder as hereinbefore noted.

The lands in controversy had occupied the status of unsurveyed lands since April 1, 1906, by virtue of office telegram "G" of March 31, 1906, pending the filing plats of resurvey on February 23, 1909.

As to the facts in the case, you found that in November, 1905, J. W. Hart, father of Ethel Hart, and for her, caused a ditch or plow furrow to be run around a 320-acre tract of land embracing the 160 acres in controversy and the 160 acres lying directly east thereof. Hart also posted a notice to the effect that Ethel Hart claimed this 320-acre tract of land. At this time Miss Hart was a minor, and she did not reach her majority until January 30, 1906. On or about February 1, 1906, Miss Hart began the reclamation of the southeast 80 acres of the said 320 acre tract, the said 80 now being described as Tract 114, of said township and range, under the resurvey. This work consisted of clearing and leveling said 80

acres, constructing the necessary ditches for irrigating and seeding the same to barley. There was also a small patch of some [60] 5 acres on the southeast forty of the 160 acres in controversy, now described as Tract 113, said township and range, planted to barley at the same time, but this small piece was neglected and it did not produce a crop of much value. The barley on the 80 acres matured in August of that year, and was enclosed with a fence. Aside from the regular irrigation of the barley on Tract 114 and the construction of a fence around the same, nothing further was done on the 320 acres until November 3, 1906, when Miss Hart and her father went upon the land and set stakes for the purpose of making out a head ditch along the east line of the land in controversy and immediately to the west of the public road, which road runs north and south between Tract 113 on the west and tracts 114 and 115 on the east. She also marked out lines for borders to be constructed on Tract 113, and she caused furrows to be plowed along the east line of said Tract 113, preparatory to the construction of a head ditch, and also plowed furrows for borders and a ditch along the south line of said tract.

On November 8, 1906, Joseph W. Cox moved a tenthouse on to the northeast corner of the tract in controversy, established his residence therein and laid claim to 160 acres. At that time Cox saw furrows which had been plowed along the east and south side of said tract, and shortly after

making this settlement he was notified by the father of Miss Hart that she was claiming the 160 acres as a part of her 320 acre tract. Cox testified that he saw no notices at the corners of the land when he went there, and that a man by the name of Ernst was then claiming the land, and that he, Cox, purchased Ernst's claim for $5.00. The claim of Ernst's was not reduced to possession and he had nothing he could transfer to Cox or anyone else, as suggested by you. Cox lived on Tract 113 from November 8, 1906, to March 15, 1909, at which last date he was ejected therefrom by the Sheriff of Imperial county, as a result of a suit brought against him by Miss Hart in the Superior Court of said county. During Cox' stay on the land he grubbed out some of the greasewood, constructed a ditch a half a mile in length along the east side of said tract, constructed Fresno borders on 50 or 60 acres of the southern part of the tract, and plowed out lines for additional borders sufficient to cover another 40 acres. He also purchased eighty-seven and one-half shares of water stock which he sought to have placed on the land, but this was refused by the water company because of the fact that Miss Hart had already placed water stock on 40 acres of Tract 113.

While the testimony is quite voluminous, you found that the material facts in the case are not conflicting, the disposition of the case turning on the construction to be given to the Act of March 28, 1908 (35 Stat., 52) counsel for Miss Hart

claiming that said act clearly gave her a preference right of ninety days after the filing of the official plat of resurvey in which to make an entry for the 320 acres claimed by her. Miss [61] Hart's claim is opposed by Cox who seeks to divide said act into two essentials; possession and good faith. He contends that the party who would claim the benefits of said act must not only have taken possession of Tract 113, but that he must also have commenced work of reclamation in good faith, neither of which essentials, he contends, was shown by Miss Hart.

In passing upon the mixed question of law and fact you say:

We are not inclined, however, to question the good faith of Miss Hart. On the contrary, we believe that so far as she is personally concerned she did act in good faith. Neither do we consider that there is any merit in the contention that her application should be rejected because she initiated her claim by marking out the extreme lines before she was 21 years of age. The work of reclamation was carried on in good faith after she became of age and for several months prior to Cox' appearance on the scene.

As to the law of the case you found that prior to the passage of the Act of March 28, 1908, there were no means by which a person could acquire a preference right to these lands surveyed or unsurveyed, other than by securing a filing. That the said act and departmental regulations prove such a means by permitting qualified persons to

take possession and commence to carry out the work of reclamation of lands unsurveyed, or which occupied the status of unsurveyed lands, and thereby gave a preference right of ninety days in which to file, after the lands became subject to filing and entry. That, in this case, the question arises as to whether said Act of March 28, 1908, is retroactive. That, in your opinion, it is retroactive to the extent that a qualified person who has complied with its provisions prior to its enactment would be granted a preference right to the tract so claimed, not exceeding 320 acres, in the absence of an adverse settlement claim or a superior possessory right not accompanied by settlement. But that merely having commenced the work of reclamation, without a settlement, prior to the passage of the act and without color of title secured by legal filing or application to file, would not prevent a bona fide settler from establishing a residence upon and asserting a claim to any portion of the tract not exceeding 160 acres, not actually reduced to possession.

You found that the action of the Superior Court of Imperial County, which ousted Cox from this land, is not binding upon you, but was such as to excuse Cox for his failure to continue to reside upon and to cultivate the land claimed by him, and now in dispute.

Notwithstanding the facts that you found that Miss Hart went into possession of the 320 acre tract, and was reclaiming it in perfect good faith

you held that Cox, with actual notice of her claim and right, may take possession, and by residence thereon, dispossess her of 160 acres of her claim.

It follows logically, that if Cox can take 160 [62] acres of Miss Hart's claim in this way, then Smith or Jones, or both, may pitch their tents on the other part of her claim, and obtain a superior right to the land actually reclaimed.

It is noticed that in holding that the work of the reclamation, without settlement, would not prevent a *bona fide* settler from establishing a residence and asserting a claim, etc., as held by you, the question becomes pertinent in this connection as to the *bona fides* of Cox in settling on land improved and in the known possession of another. Was Cox a *bona fide* settler? It is true, as you state, that the judgment and decision of the Superior Court of Imperial County, ousting Cox from possession of the land in dispute, at the suit of Miss Hart brought for that purpose, is not binding on you or the department; but as the case was thoroughly tried by the court to a jury, a judgment and decision, between the same parties, upon the identical issues involved here, are highly persuasive of being just and right. The same witnesses testified in that case as in this, and under instructions by the Court as to the law governing the case, the jury found that Cox was not entitled to the possession of the land claimed by Hart and that Hart was so entitled.

The act of March 28, 1908, provides, in part, as follows:

Provided, however, that an individual qualified to make entry to desert lands under the said acts who has, prior to survey, taken possession of a tract of unsurveyed land, not exceeding in area 320 acres in compact form, and has reclaimed or has in good faith *commenced the work of reclaiming the same* shall have a preference right, etc.

You found that as a matter of fact, and your finding in this respect was fully reflected by the testimony in the case, that Miss Hart, in good faith, commenced the reclamation of Tract 113, the land in dispute, long prior to the date that Cox sought to establish a residence on the tract, and that Cox knew these facts when he took possession.

To me it seems as Miss Hart had met every requirement of the act in question to entitle her to a preference right of entry, the act is not ambiguous as its provisions are plain and easy to understand. It provides that if an individual qualified to make a desert entry takes possession of a tract of unsurveyed land, not to exceed 320 acres, and has in good faith commenced the work of reclaiming the same, shall have a preference right, etc. It is conceded that these lands occupied the status of unsurveyed lands. It is admitted that Miss Hart is qualified to make a desert entry. It is also admitted that she has commenced the work of reclaiming the lands in

dispute. In fact, she has already irrigated about 5 acres of the land in dispute and planted it to barley, and you found that she had acted in perfect good faith. What else could she do to insure her a preference right of entry? Certainly she could not be [63] required to improve each and every part of these 160 acres before she would be immune from trespassers and claimants. She had run furrows around the land and she claimed 320 acres which includes the 160 acres in dispute. She had also leveled and bordered some 85 acres of the ground so marked out, 5 acres of which is a part of the land in dispute, and she has purchased water stock and brought water to all this cleared land and had irrigated the same.

You found that Miss Hart had acted in perfect good faith, and the record of the testimony so shows, and it is not disputed, but that Cox saw all these improvements when he erected his tent on Miss Hart's claim,—in fact he tore down some of the borders erected by Miss Hart. If Cox can legally take and retain possession of the land in dispute, he could just as legally have taken possession of the other 160 acres, when he would have found 80 acres improved and irrigated instead of five.

It seems that when Congress passed the Act of March 28, 1908, it intended to protect the rights of persons in the condition as Miss Hart is situated. After this act had been passed this office repeatedly held that its effect was retroactive.

not in a limited sense, not in part, as held by you, but in a broad and common-sense view of giving effect to clear intention of Congress and protect those who had commenced the reclammation of unsurveyed lands, not exceeding 320 acres in extent, from all intruders upon any part of said tract until they had opportunity to reclaim the same and for this purpose a preference right was given.

The identical questions at issue in this case have been before this office and the department heretofore, which facts you must have overlooked. In the case of Virgil Patterson (40 L. D. 254), decided by the department, and the case of Rachel M. Hart, decided by this office on January 29, 1912, Los Angeles, 06195, are cases in point. These two decisions affected two tracts of land lying south of the land involved in this case. So far as the surveys are concerned, they were situated exactly the same as the land of Miss Ethel Hart. They were in what was known as the "excess strip." The parties did less work than did Miss Hart to reclaim the land. Nevertheless your decisions in these cases were reversed, in refusing them the right to file.

In the case of Virgil Patterson, *supra,* it appears that Patterson had expended some $350.00 in constructing ditches and borders upon the 160 acres claimed by him, and on May 1, 1908, he sought to file on the land, but was informed by the local officers at Los Angeles that said lands were not then open to entry, but that he might

secure a preference right by improving the same, which he did, and he filed his application within two weeks after the filing of the resurvey plats. Your decision denying him the right to file was affirmed by this office, but reversed by the Department. In that case, this office held that no such acts of settlement were shown as would constitute Patterson a *bona fide* settler under [64] the homestead laws. The department held, syllabus:

Desert Land Entry—Unsurveyed Land—Act of March 28, 1908.

The possession and improvements contemplated by the Act of March 28, 1908, offering a preference right to make desert land entry to one who has taken possession of a tract of unsurveyed desert land, and has reclaimed or has in good faith commenced the work of reclaiming the same, are not such as required of a settler under the homestead law, but it is sufficient under that act if the possession and improvement conforms to the requirements of the desert land law, and evidence the party's good faith under that law.

No language of a judicial tribunal could more clearly treat the facts in the case at bar than the language of the department in the case cited above.

You, in effect, held that because Miss Hart had not fully and completely reclaimed tract 113, the land in dispute, that she is not entitled to file on that part of her claim. Your decision runs

counter to both the provisions and spirit of the Act of March 28, 1908. It is in opposition to, and in conflict with, the departmental holding in an exactly similar case,—Virgil Patterson, *supra,* which seems to be conclusive of the case at bar.

As the questions of fact are fairly clear from dispute in this case, the remaining question is one of law, under said facts, and it is my opinion, and I so hold, that Miss Ethel Hart has, by her acts of improvement, irrigation, and cultivation of the 320 acre tract claimed by her, become entitled to preference right of entry.

Accordingly, your decision is reversed, the application of Joseph W. Cox for Tract 113, T. 14 S., R. 15 E, is rejected subject to the right of appeal.

In the event of this decision becoming final, Ethel Hart will be permitted to perfect her desert land application."

In the decision of the Assistant Secretary of the Interior in the case of Hart vs. Cox, 42 L. D. 592, p. 594, the Honorable Assistant Secretary says:

"These lands, although given by the land department the status of unsurveyed lands pending their resurvey under said act of July 1, 1902, were in fact surveyed lands, under the stated old survey of 1856, and said act of March 28, 1908, had no application whatever to said lands, Henderson T. Dizney et al. (41 L. D. 257). * * *

"Cox's application made by metes and bounds, was in fact a proper application and but for such mistaken requirement by the land depart-

ment should have been allowed. His claim was substantially good and valid, and, as in the case last above referred to [65] the Department is not disposed to hold that he is now prejudiced in the consideration of his case by failing then to appeal further to the Department. He is first in right by reason of being first in the filing of a proper application, both pending the resurvey of said lands and after the filing of the resurvey plat. His application should, therefore, be allowed and that of Hart rejected as to the land in conflict."

The above-quoted decision of the commissioner of the General Land Office and this statement of the Honorable Assistant Secretary of the Interior show distinctly the question of law involved. It will be seen that since March 31, 1906, these lands occupied the status of unsurveyed lands, notwithstanding they had been surveyed. What right had the department to declare that these lands occupied the status of unsurveyed lands? The only authority that this Court can see that justified the Land Department in giving them the status of unsurveyed lands was the Act of July 1, 1902, which authorized a resurvey of the lands. This declaration of the department, that the lands occupied the status of unsurveyed lands, could have no other meaning than that, so far as the law was concerned, these lands were, after the date of the passage of the said act, unsurveyed lands. The Court cannot conceive of any other meaning to be attached to the declaration, that they occupied the status of unsurveyed lands. Of course, they were

surveyed lands in a certain sense; that is to say, they were lands which had been surveyed. But, from and after the passage of the act requiring a resurvey, so far as the acts of Congress were concerned, the lands were unsurveyed lands. The land department held that they occupied the status of unsurveyed land, which could mean nothing else than that the lands were unsurveyed lands, so far as the administration of the law was concerned.

The Act of July 1, 1902, entitled, "An Act providing [66] for the resurvey of certain Townships in San Diego County, California," provides:

> "That the Secretary of the Interior be, and he is hereby, authorized to cause to be made a resurvey of the lands in San Diego County, * * * ." (The lands to be surveyed embraced several townships, including the land in controversy.)

The evidence of the survey of 1856 upon the ground in that vast area, covered by said act had become useless, by reason of the fact that the lines of the survey were obliterated, and all that was left were some prominent monuments. This act recognized that the survey of 1856 was of no practical use and that the lands were for all practical purposes unsurveyed lands. It was impractical to dispose of these lands by congressional subdivision, according to the survey of 1856. The Act of 1902 authorized a resurvey; it did not direct that the mounds and monuments be re-established and marked upon the ground; it did not direct that the lines of the old survey be ascertained and the stakes re-set. But this act recognized that

the lands were not surveyed lands, so that they could be disposed of in accordance with the law, and directed that they be resurveyed. All the acts of the Land Department, after the passage of the act of 1902, so far as they have been called to the attention of the court, recognize that there was to be a new survey, and that the lands were to be disposed of according to the new survey; and that the survey of 1856 was an abandoned thing. On March 31, 1906, the land office issued its letter "G" by which it was declared that all the lands in this vast area, authorized to be resurveyed, occupied the status of unsurveyed lands. The contemporaneous and practical construction of a statute by those whose duty it is to carry it into effect is entitled to great respect in the [67] court. Though not absolutely controlling; it is not to be disregarded without the most cogent and persuasive reasons, for the reasons that it is usually construed by able men, masters of the subject, and frequently the draftsmen of the statute, that such construction goes a long way to prove that there is some plausible ground or reason for it in the law, or in the historical facts which have imposed a particular construction of the law favorable to such usage, and that such construction has received the implied sanction of Congress in its not passing an act abrogating the construction.

The question arises then whether or not the proviso in the act of March 28, 1908, applies to this controversy. We must assume that Congress knew what the Land Department was doing concernnig these lands in the Inperial Valley. At the time of the

passage of this act, controversies had arisen concerning the assignability of desert land entries in the Imperial Valley and it is probable that the Interior Department and Congress both had in view the Imperial Valley lands when this act of March 28, 1908, was drawn and passed, as section 2 relates particularly to the assignment of desert land entries.

I am of the opinion that the commissioner of the General Land Office was correct in his conclusion that the Act of March 28, 1908, should apply to this case and so hold.

I also think that the claim of the plaintiff, that she was prior in time as to application for the land, has merit, but it does not seem necessary to discuss that question.

OSCAR A. TRIPPET,
Judge.

The plaintiff will draw a decree and follow Rule 45 of this court.

Dated January 26th, 1920. [68]

[Endorsed]: Original. In Equity—No. D. 110. U. S. District Court, Southern District of California, Southern Division. Ethel Hart, Plaintiff, vs. Joseph W. Cox, Defendant. Conclusions of the Court. Filed Jan. 26, 1920. Chas. N. Williams, Clerk. Ernest J. Morgan, Deputy. [69]

In the United States District Court, Southern District of California.

IN EQUITY—No. D. 110.

ETHEL HART,

Complainant,

vs.

J. W. COX,

Defendant.

Statement of Evidence Introduced on the Trial to be Included in Transcript on Appeal.

The above-entitled cause came on regularly for trial before the Court on the 9th day of September, 1919. Thereupon the following evidence was introduced and proceedings had, to wit:

Plaintiff introduced the application of defendant to enter the land in question filed in the local land office at Los Angeles, California, July 17, 1907. Said application was made on the usual printed form issued by the Land Department for applications to enter land under the Desert Land Act. The land was described therein as set out in paragraph XVIII of the defendant's answer herein. Said application contained, in the printed part thereof, the following statement:

> "That said land has hitherto been unappropriated, unoccupied and unsettled, because it has been impossible to cultivate it successfully on account of its dry and arid condition."

Said application, including said statement, was

verified by the oath of defendant. Said application was marked Plaintiff's Exhibit 1. [70]

Plaintiff then read and called to the attention of the Court a circular dated June 27, 1887 (reported in 5 Land Dec. 710), issued by the Commissioner of the General Land Office to Registers and Receivers with respect to entries under the Desert Land Act of March 3, 1870, in which reference is made to Forms 4274 and 4074. In said circular, with reference to said Form 4274 it was stated:

> "Your attention is called to the terms of this declaration, as provided by existing regulations, form 4–274 which are such as require a personal knowledge by the entryman of lands intended to be entered." [71]

Plaintiff also called to the attention of the Court and read certain Rules and Regulations of the Department of the Interior relating to public lands in force February, 1907, and particularly to Form 4–274 styled "Declaration of Applicant," which verified declaration provided that the applicant should, among other things, declare as follows:

> "That I have made an actual personal examination of each and every legal subdivision of the land above described; that said land has hitherto been unappropriated, unoccupied and unsettled because it has been impossible to cultivate it successfully on account of its dry and arid condition."

Plaintiff then introduced in evidence the first application of plaintiff, Ethel Hart, which consisted of her declaration, the map of her proposed irrigation

system, affidavits of Geo. W. Bothwell and John W. Hart, and the additional affidavit of plaintiff, and also introduced the protest of plaintiff against the designation of Tract 113 as filed upon by Joseph W. Cox, under the old survey as the "north half of northwest quarter, and section 18, township 14 south, range 15 east, S. B. M.," which application and other documents were marked Plainitff's Exhibit 2. Said application and other documents were as to form and substance in all respects in compliance with the Desert Land Act and the Rules and Regulations of the Land Department.

Plaintiff's said application was dated July 30, 1907, and the land she applied to enter was therein described as the NE. ¼ of section 13, township 14 south, range 14 E., S. B. M., and the NW. ¼ of section 18, township 14 south, range 15 east, S. B. M. Said application was sworn to by plaintiff before the Register of said Land Office, and was accompanied by a map, on which was delineated the plan proposed to be adopted by applicant for the reclamation and irrigation of said land. The following is a copy of said map: [72]

The affidavits of the supporting witnesses J. W. Hart and Geo. W. Bothwell were in the usual and proper form, and were duly sworn to before the Register of said Land Office.

In the affidavit of plaintiff in support of her aforesaid application, she stated, among other things, as follows:

> "That she is informed and believes that the numbers under which she has made said application are the correct numbers given to said land by the Government survey thereof.
>
> That during the month of February, 1906, she went upon said land and viewed the same with the intention of making a desert land entry thereof and that said land was then vacant, unoccupied and unclaimed. That she is informed and believes that the numbers belonging to the W. ½ of said land had been taken erroneously by parties who had located upon land about two miles to the west of said land. She was further informed that the E. ½ of said land was excess land for which there were no numbers and for that reason an application to enter said land could not and would not be entertained by said United States Land Office. That in truth and in fact no portion of said land is excess land without numbers, but all of said land has numbers appropriate thereto as shown by the Government survey thereof. That said numbers so appropriated to said land have erroneously been used by certain parties in the location of other lands both to the west and east of the said

land. That said parties so erroneously using said numbers are not and never have been in possession or occupation of said land claimed by affiant, and do not and never have made any claim of any sort thereto. That during the months of February and March, 1906, she caused to be leveled and bordered, 80 acres of said land, to wit, the S. ½ of the NW. ¼ of Sec. 18, Twp. 14, S., Range 15 E., S. B. M., also about five *cares* on the east side of the S. ½ of the NE. ¼ of Sec. 13, Twp. 14 S., Range 14 E., S. B. M., and sowed the same with barley at a cost to her of about $465. That she purchased 80 shares of water stock in Imperial Water Company No. Five at a cost of $1600.00, for irrigation of said lands.

That during said months of February and March, 1906, in order to irrigate said land she caused to be made a ditch three-quarters of a mile long along the east side of the S. W. quarter and the S. ½ of the NW. quarter of said section eighteen, and irrigated the S. ½ of the NW. ¼ of Section eighteen, said ditch being ten feet wide and two feet deep.

That during the month of August, 1906, she caused to be built a fence of hog wire around said S. ½ of the NW. ¼ of said section eighteen, at a cost of $250.00, and fed off the crop of barley. [74]

That on November 8, 1906, she caused to be plowed a head ditch on the west side of and across the NE. ¼ of said section thirteen, and

plowed on the west side of said quarter section five lowdens, and plowed for five lowdens through the center form east to west across said quarter section."

In her verified protest filed against the designation on the resurvey map of Tract 113 as filed upon by Joseph W. Cox, plaintiff, after setting the facts in regard to her settlement, improvement and application to enter said land, stated that she protested against such designation on the grounds that she had made application to enter the same July 30, 1907, as hereinbefore stated; that prior to the time of making said application she went upon the ground and premises described on the map of the resurvey as Tract 113 and took possession of the same and improved the same; that she was in the peaceable possession and occupation thereof from on or about January 30, 1906, up to the 8th day of November, 1906.

Plaintiff then offered the second application of the defendant Joseph W. Cox, the same being in the usual form of a desert land application, and received by the local land office on March 1st, 1909, the land described therein being Tract 113, in T. 18 S., R. 15 E., S. B. M. The application contains the same statement hereinbefore mentioned as being in Cox's first application with reference to the land being unappropriated, unoccupied and unsettled, etc.

Plaintiff then introduced in evidence her second application, which was received by the local Land Office at Los Angeles, California, May 17, 1909. Said application was in all respects in the form prescribed by law and the Rules and Regulations of the

Land Department relating to entries under the Desert Land Act. The land applied for was described therein as Tracts 113, 114, and the south ½ of Tract 115, township 14 south, range 15 east, S. B. M., containing 299.33 acres, and the [75] same, with other documents accompanying said application, was marked Plaintiff's Exhibit 4. Said application was duly verified and supported by the affidavits of plaintiff, and John W. Hart and Rachel Hart, all of which affidavits were in the form prescribed by the Rules and Regulations of the Land Department and in all respects complied with the requirements of the law relating to entries under the Desert Land Act.

In her said application plaintiff declared, among other things, as follows:

> "That the land is unoccupied, unimproved and unappropriated by any person claiming the same other than myself, except that one J. W. Cox is in possession of all the Tract 113, which said Cox took possession of on the 8th day of November, 1906, and that one Ben Shank is in the possession of the S. ½ of Tract 115 which he took possession of on the 11th day of March, 1906; that Ethel Hart took possession of said land on February 1, 1906, and then and there in good faith began the reclamation of said land and has ever since and now is reclaiming the said land and intends to reclaim the same and make final proof. That on the 30th day of July, 1907, I made application to the United States Land Office to make entry of said land under the Desert Land Act, but such application was de-

nied, and I took an appeal to the Honorable Commissioner of the United States General Land Office, and that appeal is undecided and still pending."

In her affidavit accompanying her application, plaintiff among other things, stated:

"Deponent further says that she entered into possession of said land on February 1, 1906, and began at that time the reclamation of said land, which has been kept up continuously to this date; and it is now and always has been since date of taking possession, the intention of deponent in good faith, to reclaim said land, and make final proof thereon; that on July 30th, 1907, deponent made application in regular form to file a desert land entry on said land, giving the description as NE. ¼ of Sec. 13, Twp. 14 S., R. 14 E., and the NW. ¼ of Sec. 18, Twp. 14 S., R. 15 E., S. B. M., the same being the identical land heretofore in this affidavit first above mentioned, and the same being the best possible description that could be given without a survey; the same being at that time unsurveyed Government land of the United [76] States; that said application was rejected by the Los Angeles Land Office, and deponent notified of said rejection on November 7, 1907, and that deponent thereafter, within the time allowed by law, took an appeal from said rejection to the Honorable Commissioner of the General Land Office, which said appeal is now undecided and pending."

It is further stated by plaintiff in said affidavit:

"That deponent made every effort to file on said land and made Desert Land Applications therefor in due form and tendered the legal fees to Register and Receiver, as hereinbefore set forth, but that at no time subsequent to entering into possession was she permitted to make a filing and entry of the same in said land office, and that deponent has been obliged and compelled on account of the said rejection of her said application and for the aforesaid other reasons to wait until the filing of new plat of survey before she was permitted by the Land Department to make a filing therefor."

It was further stated therein:

"That the deponent having taken said land in good faith and having effected the reclamation thereof, so far as she is able and permitted, has acquired a vested right therein, and has ever since first taking possession; and in which vested right she should be protected to the full extent of the law, and as the tracts of land, parts of which she has applied for, have been segregated from the public domain for the benefit of the claimants, deponent asks that, if necessary, a further segregation be ordered to allow deponent to enter the land claimed and improved by her without the loss which will otherwise occur for reasons heretofore stated, and that in any case, she be permitted to file on the land of which she took possession, and for which she now applies.

Deponent further avers and does verily believe that the only land to which she has a vested right,

as aforesaid, is the very land of which she has taken possession and of which she in good faith has begun and continuously prosecuted the reclamation, the same being that identical tract of land which she has heretofore made application to enter as hereinbefore set forth, and unless she is permitted to enter said described land she will be irreparably injured in and divested of her vested right under and by virtue of the laws of the United States and the decisions and customs of this department."

Plaintiff then introduced in evidence the testimony of defendant given before the Register and Receiver of the United States Land Office at El Centro, in making his final proof, which is as follows: [77]

Testimony of Joseph W. Cox, for Plaintiff.

Question 1. State your name, age, residence, occupation, and postoffice address.

Answer. Joseph W. Cox; age, 63 years; Brawley, Cal.; ranching; Brawley, Cal.

Question 2. Are you a native-born citizen of the United States, and if so, in what State or Territory were you born, and of what State or Territory are you now a resident citizen? (If foreign born, certified copy of naturalization certificate must be filed with this proof.)

Answer. Yes. born in Indiana.

Question 3. Give the number and date of the Desert Land Entry, and describe the land for which this proof is made.

Answer. Los Angeles, 05545 now El Centro 02759.

March 4, 1914. For Tract 113, Sec. 8, T. 14 S., R. 15 E., S. B. M.

Question 4. State its situation, the character of the soil, its proximity to water, and what natural streams, springs, or bodies of water are upon or pass through or adjoin it. And if any, do the streams or springs afford natural irrigation?

State whether paying crops of any kind have been raised on any part of such land without artificial irrigation.

Answer. It lies about 6 miles southeast of Brawley, Cal. The soil is a medium soft sandy loam. There are no natural streams, springs or other bodies of water any where near this land. There is no natural irrigation of this land or any part of it. Paying crops have not been raised on any part of this land without artificial irrigation.

Question 5. Do you own or control, or have a clear right to, the use of water sufficient to irrigate the whole of said land and for keeping the same permanently irrigated. Answer. Yes.

Question 6. State the source and volume of the water supply, how acquired by you, and how maintained, and at what cost. [78]

(Record evidence of the claimant's right to the use of the water, or other satisfactory evidence, in accordance with the local laws, must be furnished.)

Answer. Colorado River through the canal system of Imperial Water Co. No. 5 and is acquired by the purchase of water stock in the company and maintained by payment of 50c per acre-foot for water and necessary assessments.

Question 7. State from personal knowledge whether such water has been conducted during any one season upon all the irrigable area of the land for which this proof is made, and whether same has been irrigated and reclaimed from its desert condition to such an extent that it will produce an agricultural crop, or a paying crop of hay.

Answer. It has. This land has been irrigated and reclaimed to such an extent that it will produce agricultural crops.

Question 8. State also the number, dimensions, and carrying capacity of the main ditch or ditches, and also of all the ditches on each legal subdivision of the land which are used in irrigating same; also the cost of the dams and ditches and the amount expended in the aggregate, in compliance with the legal requirements.

(If an expenditure of $3 per acre of the area of said land has not been shown by annual proofs, an itemized statement of expenditures must be furnished.)

Answer. There is one main ditch 14 feet wide at the top and 6 feet wide at the bottom by about 20 inches deep with a carrying capacity of about 8 feet of water, this one ditch irrigates the entire tract. There are no dams and the ditch cost me $50.00. I have spent in the aggregate about $3,500.00 in complying with the legal requirements.

Question 9. State whether you have seen water distributed through and by means of said ditches over all the irrigable area in each legal subdivision for which this proof is made with a view to the proper

reclamation thereof, and if so, state [79] the dates when each distribution was made, and the quantity of water per acre used, and the time occupied in making the same, in each and every year.

Answer. I have seen water distributed over all the irrigable area in each legal subdivision of this land. I am unable to give exact dates, but I saw water on the N. ½ of Tract 113 with the result that crops have been produced on it last year as well as preceding years. I saw the S. ½ of Tract 113 during the month of July, 1916, 6 acre-feet of water will irrigate the entire 160 acres of land in forty hours on the average for each time of irrigating the land.

Question 10. If there are any high points or uneven surfaces not susceptible of practicable irrigation, state definitely the nature, extent, and aggregate area of same, and the proportion thereof in each legal subdivision of the entry. State whether any entire legal subdivision is not susceptible of irrigation.

Answer. There are no high points not susceptible of irrigation.

Question 11. Has any portion of the land been cultivated by actual tillage of the soil? If so, state definitely the number of acres thus tilled, and describe generally the tillage, and briefly state its time, its object, and its results.

Answer. Yes. 150 acres of it has been actually tilled. It is disced, plowed, harrowed and seeded then irrigated. This land has been in cultivation since the year 1910. The object of such cultivation being

the production of agricultural crops. The crops have been fairly good.

Question 12. Has an agricultural crop of any kind other than wild hay been planted or produced on any portion of the land? If so, state the kind of crop planted or raised, the average quantity per acre, and the number of acres employed in the planting and growth of said crop. [80]

Answer. Agricultural crops have been produced on this land for the last 7 years. Barley average 15 sacks per acre; corn average 3–4 tons per acre. Beans which were almost a failure. About 60 acres are in corn at this time which will average about 3–4 tons per acre.

Question 13. If an agricultural crop of any kind cannot be produced on one-eighth portion of the land, by actual tillage of the soil, state whether a crop of wild hay of merchantable value has been raised upon said land as a result of actual irrigation, and state the area on which it was raised and the quantity produced per acre.

Answer. Agricultural crops can be grown on every bit of this land.

Question 14. If there has been no actual tillage of the soil, or no agricultural crop planted or produced, state what climatic conditions adverse to successful agriculture, if any, are prevalent in the region in which land is located. State fully the effect of such conditions on agriculture.

Answer. There has been actual tillage of all of the soil in this entry excepting, of course, that which is devoted to roads ditches and such uses.

Question 15. If in your judgment actual tillage of the soil would injure or destroy its productive qualities, state definitely your reasons for believing that injury or destruction would result from actual tillage.

Answer. Actual tillage will not, in my judgment, hurt this soil.

Question 16. If paying crops of any kind have been raised on land adjacent to, or in the vicinity of, said land, without artificial irrigation, describe the same and state the year or years of cultivation, the kind of crop and quantity per acre and the conditions which made the production of such crops possible. [81]

Answer. Paying crops have not been raised on any part of this land or any other land anywhere near this land without artificial irrigation.

Question 17. Has any coal or other minerals been discovered on said land, or is any coal or mineral known to be contained therein.

Answer. No.

Question 18. Are there any indications of coal, saline, or minerals of any kind on said land? If so, describe what they are?

Answer. None.

Question 19. Have you the sole and entire interest in the land for which this proof is made and in the right to the water sufficient to continuously irrigate the same?

Answer. Yes, except that the entry is in contest.

Question 20. Has any other person, individual, company, or corporation any interest whatever in said land or water appropriations? If so, give the

name, residence, and occupation of each such person, the name, business, and locality of any such corporation or company, and the nature, amount and extent of such interest.

Answer. None except in the matter of the contest as given before.

Question 21. Have you made any other desert land entry, or has any other land embraced in any desert land entry, in whole or in part, been assigned to you, or have you any interest, direct or indirect, in any other entry under the desert land act?

Answer. No. No. No.

Question 22. Describe by legal subdivisions and by number, kind of entry, and office where made, any other entry or filing (not mineral), made by, or assigned in whole or in part to, you since August 30, 1890. [82]

Answer. I have made one other entry only, a homestead entry No. 3553, made at North Yakima, Washington, on September 19, 1902, for the N. ½ of NW. ¼, SW. ¼ of NW. ¼ Sec. 11 and SE. ¼ Sec. 2, T. 7 N., R. 12 E.

Question 23. If this proof is not submitted within four years from date of entry, state the reason for the failure to make proof within said period.

Answer. * * *

JOSEPH W. COX,

(Sign here, with full Christian name.)

NOTE.—Every person swearing falsely to the above deposition will be punished as provided by law for such offense. (See Sec. 5392 R. S., over.)

#Note.—A correct diagram, showing the location

of all ditches and improvements, must be furnished with this proof.

I HEREBY CERTIFY that the foregoing deposition was read to or by dependent in my presence before dependent affixed signature thereto; that deponent is to me personally known that I verily believe deponent to be the identical person hereinbefore described, and that said deponent was duly subscribed and sworn to before me, at my office, in El Centro, Imperial County, California, within the Imperial land district this 28th day of November, 1916.

PHILLIP W. BROOKS,
Register U. S. Land Office. [83]

It appeared, without conflict, from the evidence that the defendant did not at any time, conduct any water upon any part of said Tract 113; that he did not, at any time, irrigate or cultivate any part thereof, or at any time, plant, raise or produce any crop or corps of any kind thereon.

Plaintiff also introduced the affidavits of the corroborating witnesses upon such final proof, the same being in the usual form, and to the same effect as that of Cox.

Plaintiff then introduced a transcript of the testimony taken before the Land Department upon the hearing granted by the Department to determine the rights of the plaintiff and defendant to the land in question, such hearing being held by the Land Department on the 25th day of January, 1912.

The said testimony was taken before the Honorable Register and Receiver of the Land Office at Los An-

geles, before whom witnesses appeared in person and were interrogated on behalf of the respective parties by their attorneys, such testimony was without any substantial conflict and showed the facts as follows: Defendant made his application by metes and bounds July 17, 1907, as hereinbefore and in the complaint stated, which application was rejected and, on appeal, such rejection was confirmed by Office Letter G, July 13, 1909, which decision was affirmed by the Commissioner of the General Land Office and no further appeal was taken.

That Ethel Hart made application July 30th, 1907, for the northeast quarter Section 13, T. 14 S., R. 14 E, and the NW. ¼ of Section 18, in T. 14 S., R. 15 E., which application was rejected by the local land office, November 7th, 1907, on the ground that the land described was included and covered by prior applications, as hereinafter stated. An appeal was taken from such rejection and action thereon by the General Land [84] Office was deferred awaiting the completion of the resurvey of said township under the act of July 1st, 1902.

After the filing of the final plat of resurvey both parties made application thereunder as hereinbefore stated. That prior to 1906, the entire tract of 320 acres claimed by plaintiff was unoccupied desert land, belonging to the United States.

That in November, 1905, J. W. Hart, father of Ethel Hart, and for her, caused a ditch or plow furrow to be run around the 320-acre tract embracing the one hundred sixty acres in controversy and the one hundred sixty acres lying directly east thereof.

Hart also posted a notice to the effect that Ethel Hart claimed the 320 acres so included within the furrows. At this time Miss Hart was a minor and she did not reach the age of 21 years until the 30th day of January, 1906. About February 1st, 1906, Miss Hart commenced the reclamation of the said eighty acres now being described as Tract 114, of said township and range, under the resurvey.

In the early part of February, 1906, she caused a disc harrow to be run around the entire tract, thus marking the exterior boundaries thereof. Also immediately thereafter she caused the S. E. 80 acres, not upon the tract immediately in dispute, to be prepared, planted to barley and irrigated. The S. E. Corner is shown by the evidence to be the highest point in the tract of 320 acres and that the work of reclamation in that neighborhood is usually inaugurated at or near the highest point of any given subdivision so that the water may be most conveniently distributed. A ditch was constructed along the east line of said 80 acres and connected with the system of Imperial Water Company No. 5, in which plaintiff owned 80 shares of stock, and the crop of barley was irrigated [85] from said ditch and by plaintiff fed to hogs. There was also a small patch of five acres of the southeast quarter now in controversy now described as Tract 113, said township and range, planted to barley at the same time, but this small piece was neglected and it did not produce a crop. The barley on the eighty acres matured in August of that year, and was enclosed with a fence. Aside from the regular irrigation of the barley on Tract 114, and the construction

of the fence around the same, no further work of reclamation was done on the 320 acres, until November 3d, 1906, when Miss Hart and her father went upon the land and set stakes for the purpose of marking out the head ditch along the east line of the land in controversy, and immediately to the west of the public road which road runs north and south between Tract 113 on the west and Tracts 114 and 115 on the east. She also marked out lines for borders to be constructed on Tract 113, and caused a few furrows to be plowed along the east line of Tract 113 preparatory to the construction of a head ditch, and also plowed furrows for borders and a ditch along the south line of said tract. Plaintiff and her father temporarily ceased to complete the work in which she and her father were so engaged because they were obliged to attend to the irrigation of other lands, but she never intended to abandon the land.

On November 8th, 1906, Joseph W. Cox, defendant herein, moved a tent house on the northeast corner of the tract in controversy and established his residence therein, and laid claim to one hundred sixty acres. At that time Cox saw the furrows which had been plowed along the east and south side of said tract and shortly after making settlement he was notified by the father of Miss Hart that she was claiming the one hundred sixty acres as a part of the three hundred and twenty acres. [86] Cox testified that he saw no notices at the corners of the land when he went there and a man by the name of Ernst was then claiming the land and that he, Cox, purchased Ernst's claim for $5.00. Ernst never was in possession of the

land. Cox lived on Tract 113 from November 8th, 1906, to March 15th, 1909, at which last-mentioned date he was ejected therefrom by the Sheriff of Imperial County as a result of a suit brought against Cox by Ethel Hart in the Superior Court of Imperial County. During Cox's residence upon the land he grubbed out some of the greasewood, constructed a ditch a half mile in length along the east side of the tract, constructed fresno borders four rods apart on fifty or sixty acres of the southern portion of the tract, and plowed out lines for additional borders sufficient to cover another 40 acres. He also purchased 87½ shares of water stock which he endeavored to have placed on the land, but this was refused by the Water Company because Miss Hart had already placed water stock on 40 acres of this tract 114. There was also introduced in evidence at the hearing before the Department a transcript of the proceedings in the Superior Court of Imperial County, which showed that on May 21st, 1908, the complainant herein commenced an action against the defendant herein to recover the possession of the lands here in controversy, alleging ownership and right of possession in herself and unlawful entry by the defendant on November 8th, 1906. That the defendant answered the said plaintiff denying plaintiff's title and right of possession. That the case was tried before a jury and submitted to them upon the same evidence as to possession hereinbefore recited without any attempt by either party to connect himself with the Government title. That the Court instructed the jury in such case as follows: [87]

Instructions of Court to the Jury.

INSTRUCTION.

Under the pleadings in this case, the only question which are involved is the plaintiff's ownership and right to the possession of the property and the amount of damages, if any, suffered by the plaintiff. The defendant admits by his answer, that he did enter into possession and is now in the possession of the property described in the complaint and the whole thereof.

INSTRUCTION.

In order to prove ownership sufficient to maintain an action of ejectment prior to actual possession of the plaintiff is sufficient evidence of title to prove ownership, and will entitle the plaintiff to recover, unless the defendant can account for such possession or show a prior possession or title in himself.

INSTRUCTION.

In an action like the one here brought to recover the possession of certain land to which neither party claims paper title and the plaintiff relies upon the prior actual possession of said land, the defendant cannot show title in a third person. So as between two parties, neither of whom connect themselves with the Government title, the first actual possessor is absolutely presumed to possess the legal title. So if you are satisfied from the evidence in this case that the plaintiff had the prior actual possession of the lands described in the complaint, she is entitled to recover possession of said lands in this case.

The possession which it is necessary for the plain-

tiff to show in an action of this kind, is an actual possession as distinguished from constructive possession. By actual possession as here used is meant the subjection of the land to the will and dominion of the claimant, and is usually evidenced by occupation, or by cultivation, or by appropriate use, according to the particular locality of the property. However, it is not necessary that the land should be cultivated or resided upon, or that buildings should be erected thereon, where the subjection of the land to the will and dominion of the claimant is manifested in some other and appropriate manner. In determining whether the land in question was occupied and used for the purposes to which it was adapted (if you find from the preponderance of the evidence that the plaintiff did so occupy the land) you may take into consideration the manner in which the owners of land of like character in the same vicinity commonly occupy and use such land, and if you find from the preponderance of the evidence that the plaintiff, at the time of defendants' entry was using and occupying the land in question in the same manner in which owners of land of like character in the same vicinity commonly used and occupied their land then you are instructed that such acts were sufficient to constitute actual possession within the meaning of these instructions and are sufficient actual possession to entitle plaintiff to recover in this action.

INSTRUCTION.

In order that you may have no misunderstanding as to what is meant by actual possession, the Court further instructs you that if any entry is made with

the intention of retaining permanent possession and clearing and improving the [88] land, and fitting it for cultivation, it may be sufficient to authorize the inference that the possession is actual, for as you have already been instructed, subjection of real property to the exclusive will and control of the possessor, by means of exercise by him or her of notorious acts of dominion over it, constitute actual possession, and therefore under such circumstances wherein plaintiff has so subjected the property, the plaintiff is deemed to have the actual possession thereof, although absent therefrom.

INSTRUCTION.

In determining whether the plaintiff had actual possession of the tract of land described in the complaint, you have the right to take into consideration and consider any evidence as to acts which you have already been instructed would tend to prove actual possession which were done upon any portion of the entire tract which the plaintiff may have taken possession of, of which the said land described in the complaint forms a portion; provided there are evidences upon the whole tract to indicate that the whole claim is included in one and occupied by one and the same person.

INSTRUCTION.

You are instructed that the qualifications of the person taking possession of the United States Government land, such as citizenship and the like, cannot be considered in a case of this kind and the only party who can raise or take advantage of it is the United States Government itself.

You are instructed that it is entirely immaterial whether or not plaintiff or defendant has complied with the desert land laws as there is no evidence that plaintiff or defendant ever made an entry or acquired any rights under the desert land laws.

In order to constitute possession, land must be either enclosed or put to the use to which such land is ordinarily put in the neighborhood. Getting ready to put the land to such use is insufficient, unless the work done in getting ready is done on the land and is notorious and uninterrupted and appears upon the land.

You are instructed that the mere marking out of the lines of land with furrows, or otherwise, does not constitute possession of the land thus marked out, unless other acts of possession are diligently pursued.

In determining whether or not plaintiff was at the time of defendant's entry in possession of the land in controversy, you are instructed that you are not to consider any evidence which has been introduced as to what was done by plaintiff upon the 80 acres of land lying east of and across the road from the land in question, unless you find from the evidence that the evidences of possession extend to the whole tract.

If you believe from the evidence that at the time of defendant's entry on the land in controversy, the same was unoccupied Government land, then your verdict should be for the defendant.

You are instructed that in the case of Government land where a person lays claim to 320 acres and take actual possession of a part thereof such act does not constitute possession of the entire tract plain, but

only of the tract of which actual possession is taken; however all portions of the 320 acres need not be in the same state of cultivation nor [89] is it necessary that the same acts of dominion be evident on all portions of the tract in the same manner or to the same extent.

You are instructed that the extent of plaintiff's claim is immaterial and it is also immaterial what land she intended to claim or appropriate, if there was not on the 160 acres in controversy at the time defendant entered thereon any visible evidence of the actual dominion over that particular 160 acres, of land, nor any evidence that the 160 acres in question was a part of the tract under higher stages of cultivation then your verdict should be for the defendant.

In order for the plaintiff to recover in an action of ejectment on the grounds of prior possession, such prior possession must be of such a character as to create the presumption that the plaintiff is the owner of the land. It must be such a character of possession as would, if continued for the period prescribed by law, defeat a person having a record title to the land.

Persons having settled in person upon the public land, improving it or erecting dwelling-houses thereon, inclosures, or any other substantial improvements, are lawfully in possession, have a right to be protected in it and if ousted, may sue for recovery. To maintain ejectment, a right of entry and possession is all that is required.

A settler on public lands, if ousted after the lapse of a reasonable time within which to improve it, can

recover against the persons in possession only by showing an actual, notorious, prior possession.

When one shows that he first entered upon it, marked out the boundaries and diligently proceeded, or diligently made preparations to do such acts as were necessary to constitute an actual possession, he will be entitled, even without showing actual possession, to recover against a person subsequently entering.

The Court instructs the jury that the law assumes that those in possession of land are rightfully in possession, and one who claims that the persons in possession are unlawfully in possession, must satisfy the jury by a preponderance of the evidence that he has a good title and better title than the defendant. The plaintiff must recover upon the strength of her own title, or claim.

JURY SHALL CONSIDER—WHAT.

In determining what your verdict shall be in this case you must confine yourselves to a consideration of the law as given you by the Court, and the testimony in the case, together with any documentary evidence that may have been introduced. Statements of counsel not supported by such evidence must be wholly disregarded by you in making up your verdict; except that you are to consider stipulations of counsel, agreed upon by both sides and stated to you during the course of the trial, and any admissions of fact made by counsel representing the respective parties to this action. Testimony excluded by the Court, or stricken from the record by order of the Court must not be considered by you.

It is your duty not only to take into consideration all of the testimony given by the witnesses, and to weigh the same with care, but it is your duty to take into consideration in weighing such testimony and in reaching a conclusions, all of the surrounding circumstances shown by the evidence and to draw all of the inferences from such circumstances and the testimony of the witnesses as may be reasonably drawn therefrom. [90]

INSTRUCTION.

No damages have been proved in this case, and therefore none can be allowed by the jury.

You are instructed that before you can return a verdict three-fourths of your number must agree thereto; when three-fourths of your number have so agreed to a verdict you will cause the same to be signed by your foreman and returned into Court.

If for the plaintiff, your verdict will be: "We, the jury, find for the plaintiff, that the plaintiff recover of and from the defendant the possession of the premises described in the complaint." If for the defendant, your verdict will be: "We, the jury, find for the defendant." [91]

And the following instructions were refused: [92]

You are instructed, that before the plaintiff in this case can recover she must show that at the time of defendant's entry she was in the actual possession of the land in controversy, and she must recover by virtue of such showing of possession alone, inasmuch as she could not at the time of such entry acquire any preference right to enter said land, the law at that time not containing any provisions allowing preference right allowing a man over twenty-one

years of age, or the head of a family as to a homestead of one hundred and sixty acres.

(Marked) Refused and in particular for the reason that the same point is covered by other instructions given.

You are instructed that where, as in this case, plaintiff relies upon what is claimed as proof of possession, it must be shown that at the time of defendant's entry, plaintiff was in the actual possession of the premises claimed and that such occupation was notorious and continuous. The performing of casual possessory acts is not sufficient.

(Marked) Refused for the reason that the same point is covered by other instructions given.

You are instructed that if you believe from the evidence that on or about the 1st day of February, 1906, plaintiff laid claim to 320 acres including the land in controversy, and took actual possession of 80 acres or more thereof but did not take actual possession of the eighty acres in controversy, then your verdict should be for defendant.

(Marked) Refused for the reason that same point is covered by other instructions given.

You are instructed that in case of Government land possession by a claimant of part of a tract claimed by him or her is not possession of the entire tract.

(Marked) Refused for the reason that same point is covered by other instructions given.

The mere discing around the exterior borders of the tract of land claimed by any person does not constitute actual possession.

(Marked) Refused for the reason that same point is covered by other instructions given.

You are instructed that in the case of Government land where a person lays claim to 320 acres and takes actual possession of a part thereof, such act does not constitute possession of the entire tract, but only of the tract of which actual possession is taken.

(Marked) Refused for the reason that same point is covered by other instructions given.

If you believe from the evidence that at the time of defendant's entry on the land in controversy the plaintiff was in actual possession of a part of such land, then you should find for the plaintiff for such portion only and describe the same, and you should find for the defendant as to the remainder. [93]

(Marked) Refused for the reason that same point is covered by other instructions given.

You are instructed that where, as in this case, the plaintiff relies upon possession alone as a ground of recovery such possession must be an actual possession. Plaintiff's actual possession cover only such lands as were inclosed or were usually cultivated or improved.

(Marked) Refused for the reason that same point is covered by other instructions given.

You are instructed that the plaintiff did not by discing around the land in controversy or by putting in cultivation the 80 acres lying immediately south of it acquire any right to the land in controversy under the desert land laws.

You are instructed that the plaintiff was not eligible to enter Government land before she became 21 years of age and could not before she became of

such age secure or acquire any right to Government land.

(Marked) Refused. [94]

A verdict and judgment in said action was rendered and entered in favor of plaintiff and against defendant, and an appeal therefrom was taken by defendant to the Supreme Court of California, which last-mentioned court affirmed the judgment. The material facts involved in said action are set out in the decision of the Supreme Court of California appearing in Volume 171, Cal. Rep., at page 364. The evidence so given is not set out in further detail for the reason that, as found by the Assistant Commissioner of the General Land Office and the Assistant Secretary of the Interior, there was no substantial dispute as to the facts.

It appeared from the evidence on the trial of this cause, and it was admitted by the defendant, that the only work of any sort done by defendant on said Tract No. 113 was such work as he had done thereon, as herein stated, prior to March 15, 1909, the date on which he was ejected therefrom by the sheriff. [95]

There was also introduced in evidence the depositions of the following witnesses: E. G. Walker, J. W. Hastain, George W. Bothwell, Harry Campbell, Thomas O'Brien, J. B. Hart, J. W. Hart, Ethel Hart, on behalf of the plaintiff, and Mrs. Lucetta Cox, Minnie D. Sebille, J. R. Stephens, J. W. Cix, Balies G. Walker, A. L. Sebille, and L. Friel, on behalf of defendants.

All of said witnesses, except George W. Bothwell and L. Friel, deposed either with deference to the

physical situation condition, improvements, work of reclamation, irrigation or crops raised on said land, as herein stated; their testimony being substantially the same as the testimony introduced upon the hearing before the Register and Receiver as hereinbefore set forth.

The testimony of the said Bothwell on behalf of the plaintiff being as follows:

Testimony of George W. Bothwell, for Plaintiff.

GEORGE W. BOTHWELL, being duly sworn, testified: That he is a civil engineer and has been engaged in the practice of civil engineering for 25 years and had more recently been an orange grower. That he became acquainted with the Imperial Valley in December, 1900, and continued to be familiar with it for nine or ten years; that he knew the land in controversy and knew the plaintiff and her father and mother; that he drew up the application for the plaintiff for the lands described as the northeast quarter of section 13, township 14 south, range 14 east, S. B. M., and the northwest quarter of section 19, township 14 south, range 15 east, S. B. M.

I described the land in that way for this reason. I had surveyed that part of the country previous to that, and had maps of it and knew that was the description according to the Government survey made in 1856.

The defendant here moved to strike out the statement of the witness that "he knew it was the description," for the reason that it was not shown that the witness had the necessary knowledge to make such an answer and that it was naturally his conclusion. [96]

(Testimony of George W. Bothwell.)

The witness continues: I examined the field-notes of the survey of 1856, and made a survey under contract with the California Dev. Co., to re-establish the old Government lines where they were obliterated and to locate them. I made a map of my survey.

A copy of said map was introduced in evidence, and is as follows: (Here insert a copy of said map on file herein as a part of Plaintiff's Exhibit 9, and which is referred to and designated in said Exhibit 9 as Plaintiff's Exhibit 1.)

MISSING

(Testimony of George W. Bothwell.)

I found on examination certain landmarks that aided me in locating the land of Ethel Hart according to the survey of 1856. I found a mesquite tree that was marked and from that was north and a little west of this point that a Sunset Springs which was mentioned in the field-notes which was located a certain distance from the corner of a certain section-witness corner. The mesquite tree which was located was the common corner of sections 14, 15, 22 and 23 in township 13 south, range 14 east. Sunset Springs was a witness of common corner of sections 11, 12, 13, 14 in township 14 south, range 15 east.

I did not discover any other monuments called for by the field-notes of the survey of 1856 which assisted me in locating the land claimed by Miss Hart, that is, no definite corner, only the topography of the country. By it, these field-notes and the monuments I refer to, I was able to locate the proper description of the land claimed by Miss Hart under 1856 survey, and did so locate it. The description which I inserted in her application was the proper description of that land according to the survey of 1856.

I went with Miss Hart to the Land Office, where we made affidavits and tendered the money. The officials of the Land Office refused to accept the money; the reason why they stated they rejected the application was that the land was already entered. Then we had some argument about the land being entered, whether it was or not, and they said, "Well, the numbers were taken," and I explained to them that the land was not entered, that there was no other claim-

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(Testimony of George W. Bothwell.)

ant of the land. Then they said that the numbers were taken and they could not allow two filings on the same number. That was all the conversation I remember. Miss Hart then took an appeal from their decision, to the [97] Commissioner of the General Land Office. Prior to that time I had had many conversations with the Register and Receiver and Chief Clerk of the Land Office about what to do in cases where persons had taken the numbers to land under the 1856 survey and the land was really vacant land and their advice was in such cases to do nothing; that a filing could not be had upon the land; the course usually taken then was to, when the application was rejected, to take an appeal. That is what we did in Ethel Hart's case.

The distance from the Sunset Springs corner to the northeast corner of the land in dispute is five and one-half miles. The field-notes of the 1856 survey showed that it should be exactly 5 miles. Between the two points I did not find any monuments of the 1856 survey, nor did I find on that easterly and westerly line any monument of 1856 survey west of the northeast corner of this land. Neither did I find any monument on the north and south lines running through the east line of this land. Between Sunset Springs and the east line of section 13, I found no monument and I found no monuments west of that. Neither did I find any monuments on the township line between township 14 east and 15 east. I did not find any monuments in township 14 south, range 14 east. In all of my work there I never found any township

(Testimony of George W. Bothwell.)

corner. I never run any of the subdivision lines of a township line, but had a surveyor run it for me, and in making the application for Miss Hart I based my idea on the corner of the location from what he reported to me and from the maps which we made up on that survey, I running the township lines myself. The field-notes of the survey showed that the south boundary of township 14 south, range 15 east, was exactly four miles south of the common corner of sections 11, 12, 13, and 14, and exactly five miles west of that corner. Sunset Springs was the only original corner found in that township, but I found a mesquite tree in the township 13 south, range 14 east. The mesquite tree, however, was not on a line with any part of section 13, whereas Sunset Springs corner is on a line with the north line of section 13. [98] But if a surveyor were retracing the lines he would take the two points. The Alamo River at that point showed that it had not changed its course, and the channel at that point is probably 25 feet deep. There have been no changes between 1856 and the date I made my survey, in the Alamo River channel. The Alamo River was also a monument called for in the field-notes of the survey of 1856. The field-notes also called for two other trees in that neighborhood, but I was never able to find them.

The reason why we did not proportion the distance between the two known monuments I have referred to, was that knowing there was an excess and having ascertained there was an excess we followed the com-

(Testimony of George W. Bothwell.)

mon practice at the request of the C. D. Co.'s engineer of throwing the excess in sections on the north and west. We locate the township lines frequently nearest the known point to that township line.

There is no question about the fact that Sunset Springs is the monument called for by the field-notes of 1856 survey. I know that the proposition of throwing the excess to the north and west side of the township is entirely impossible when it comes to the tracings of the survey and not permitted in the tracing of the survey at all, but that one must prorate all distances. But we did it there. There were several reasons why we did not prorate the distances; one was that the C. D. Co. did not want to furnish water stock for 800 acres or 700 acres of land in a section and did not want to locate 400 acres where there were only 320, or if there were 400 originally in a half section, they did not want to enlarge a half section.

I have not seen the printed instructions of the Government for retracing public surveys lately, and have not done any surveying for 5 or 6 years. I never made a public survey under the direction of the Department of the Interior. [99]

It appeared from the testimony of plaintiff and J. W. Hart that they had made several visits to the local land office at Los Angeles, California, between February, 1906, and May, 1907, for the purpose of entering the land claimed by plaintiff under the Desert Land Act; that plaintiff and J. W. Hart were informed by the Register and Receiver and other officials in said land office that she could not make entry

of said land, for the reason that it appeared from the Tract Book and other records of said office that applications to enter said land had already been filed and that they were not permitted to receive any further applications therefor; that she inquired of said officials what course she should take to enter said land under the Desert Land Act, and was informed by them that there was no method by which she could file an application; that the only thing for her to do was to maintain her possession of the property and reclaim it and when the plats of the resurvey were filed she could then make application and would have a preference right.

It further appeared from the testimony that the plaintiff, J. W. Hart and Thomas O'Brien, in the month of June, 1907, went to the Los Angeles Land Office and that plaintiff stated that she desired to make an application to enter said land wherein the land was described in accordance with the 1856 survey, and that the Register of the Land Office (after it was explained to him that the record showed the section numbers for this land had been taken, but that the land which she desired to enter was not claimed by anybody), stated to them that the only way plaintiff could get any right to the land would be by settling upon it and holding possession and waiting until the resurvey had been made.

It further appeared from the evidence that a few days afterwards, J. W. Hart, father of plaintiff, met the witness G. W. Bothwell, [100] and stated to him that plaintiff was desirous of entering said land

and related to said Bothwell what had been so stated to plaintiff, said J. W. Hart and O'Brien. That Bothwell then told said Hart that he could get a filing on the land on record; that he had handled a great many applications where the same situation existed. That thereupon plaintiff employed said Bothwell to prepare an application for said land for her and to secure a filing of the same. That July 30, 1907, plaintiff, under the direction and advice of said Bothwell, went with said Bothwell and said J. W. Hart, to the local land office and then and there offered for filing her application with the supporting affidavits, as hereinbefore stated, and at the same time tendered to the receiver of said local land office the amount she was required by the Desert Land Act to pay to enter said lands; which application was rejected as hereinabove set forth

It was also shown and admitted by the defendant that after Cox was excluded from the land in 1909, he did no other work of any kind or character on the land and that the plaintiff again took possession of the land and completed the reclamation thereof, but that after the Desert Land entry was allowed to Cox by the Land Department, he procured a complete water right for water to irrigate the land by purchasing water stock in Imperial Water Co. No. 5, a mutual water company, which supplied water to lands in that vicinity.

During the year 1909, said Imperial Valley Water Co. No. 5 completed its ditch to the high corner of said Tract No. 113 and thereafter delivered water to the plaintiff for the irrigation of said land; but at

(Testimony of L. Friel.)

no time did said water company deliver any water to defendant for use on said land or did defendant use any water on said land. [101]

Testimony of L. Friel, for Defendant.

L. FRIEL testified on behalf of the defendant as follows:

I reside in Los Angeles City and am by occupation a surveyor and civil engineer. Have been engaged in that business for 45 years. During that time I have made many public surveys under the direction of the Department of the Interior and am familiar with the methods of making public surveys. I have made surveys in Imperial Valley under the direction of the Department of the Interior during 1907 and 1908. Township and section subdivision lines of the resurvey in Imperial Valley were not retracements of the old lines. The claim lines were locations according to where the claimant claimed his land. Before entering upon the work of resurveys in Imperial Valley, I went over the whole of Imperial Valley looking for monuments of the original surveys and found altogether six monuments of the original survey. One of them was a mesquite tree in township 13 south, range 14 east, the common corner of section 14, 15, 22 and 23; another was the corner indicated by the natural witness point of the Sunset Springs in township 14 south, range 15 east, S. B. M.

The witness' attention was called here to a map introduced by the plaintiff in connection with the testimony of George W. Bothwell, and marked Plaintiff's Ex. 1 and examines map.

(Testimony of L. Friel.)

Witness continues: The making of this large section shown on that map is not warranted by the existing monuments of the old surveys that I have found or that Mr. Bothwell has indicated.

Witness' attention is next directed to a map of the old survey, township 14 south, range 14 east, which is introduced and marked Defendant's Ex. 2, a copy of which is as follows: [102]

(Testimony of L. Friel.)

Witness continues: The location of section 13, in the map marked Plaintiff's Exhibit 1, does not correspond with the location of section 13, in that township according to the topography shown upon the map of the original survey. According to the map of the original survey, the township line is about one-half mile further east from the large arroyo now known as the Alamo River and shown on Mr. Bothwell's map. The proper location of the township line is about a half mile further east than shown on Mr. Bothwell's map according to the location of the arroyo. If the river herein be ignored, and only those two points, the mesquite tree and Sunset Springs taken into consideration, the proper position of the township line would be about 35 chains east of the line as shown on Mr. Bothwell's map.

Cross-examination.

I examined the mesquite tree in township 13 south, range 14 east, in 1907, saw the markings upon it, and was certain that it was a Government monument [104] of the old survey. The Sunset Springs was a witness monument. In the making of surveys a variation of about 3 chains in a township are allowable. If the return survey showed any more than that it would be rejected. The other monuments which I found in Imperial Valley of the old survey, one was west of the City of Imperial,about 8 or 9 miles south and 4 miles west of the land in question; the other was about 8 miles south of that. I connected up the manuments which I found and it showed there was an excess of about 5 chains to the mile or about

G PAGES

(Testimony of L. Friel.)

1¼ miles in excess of the entire valley, and a little over a mile in north and south of the entire valley. In making the location of the land in question I would connect with two corners, the mesquite tree and the Sunset Springs corner and proportion the distances between them. In other words, I would run a line south from the mesquite corner until I arrived at a point west of the Sunset Springs corner. I would then measure the distance and divide the surplus. I would proportion the distances between the two to establish the range line between the two townships.

Redirect Examination.

In retracing Government surveys it is not permissible to locate a section by reference to measurements from one corner only. The Department instructs against that. In making a retracement, it is necessary to consider at least two places, on the line on each side of the places it is desired to relocate. If the distance on the ground does not accord with the field-notes, it then becomes necessary to prorate it. It is not permissible according to the rules of surveying in retracing the subdivision lines of a township where it is found that the measurements of a township line is excessive and longer than it is shown on the field-notes or the plat of the survey of the original township, to cast the excess into the north and west portions or tiers of sections. [105]

Recross-examination.

If the interior corners of a township are gone, the proper method is to re-locate and re-establish the township lines, and after re-establishing the township

(Testimony of L. Friel.)

lines, then to proceed in accordance with the field-notes, and if the distance is found to be in excess of that called for in the field-notes, to then prorate. If the corners of the township have been destroyed monuments, go back until you find point to begin from to re-establish the township lines. If one point is found within a township, then we use it in connection with other corners we find outside the township. One old established corner within the township does not control as to establishing the township lines of that township. If we did that in Imperial Valley we would have different township lines for every township. My answers as to the method of re-locating corners is based upon instructions issued by the Department of the Interior. It is a printed document, sometimes called a manual, for re-tracements of lost corners, but does not differ in principle from the customs and rules of surveyors of all time. The field-notes of the old survey show that the township line in question was 2 miles east of this mesquite tree, but also show that it was 5 miles west of the Sunset Springs corner. It could not be both. If the township line for township 13 south, range 14 east were located by reference to the mesquite tree, and the township lines between 14 and 15 east by reference to the Sunset Springs, the result would be a broken township line. [106]

There was also offered in evidence by complainant certified copies of the official plats of resurvey of township 14 south, range 15 east, S. B. M., the same being marked Exhibits 10–A, 10–B, 10–C, 10–D.

(Here insert copies of plats, with endorsements.)

[107]

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LARGE
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There was also introduced in evidence the following letters and telegrams from the Commissioner of the General Land Office, to wit: [111]

Exhibit II.

TELEGRAM.

Marked, Received by U. S. Land office, Los Angeles, California, March 31, 1906.

Washington, D. C., March 30, 1906.

Register and Receiver,

Los Angeles, Cal.

Suspend entries in Townships 13 to 16 South, Ranges 11 to 16 East, and in 17 South, Ranges 15 to 16 E., S. B. M., after March 31, 1906.

W. A. RICHARDS,

Commissioner.

Also commissioner's letter dated June 19, 1906, Department of the Interior, General Land Office, Washington, D. C.

Register and Receiver,

Los Angeles, Cal.

Gentlemen:

I am in receipt of your letter of June 8, 1906, as follows:

"I have the honor to report that Mr. G. W. Bothwell presented your letter 'G' May 25, 1906, ruling that the withdrawal of Imperial Valley Lands pending resurvey in nowise affects entries theretofore made; hence annual and final proof should be submitted as though no order of withdrawal had been issued.

"To almost daily inquiries by entrymen in person

and by letter, reply has been made by this office that annual and final proofs would be accepted, but that in Porter vs. Carlisle, XXXIV Land Decisions, page 361, it was held that the time does not run against an entry while under suspension and the claimant still has the remainder of the statutory period, after the suspension is removed, within which to show compliance with the law; and that such is the rule in the Imperial Valley under the order of withdrawal; except that under rule in Langer vs. Wasman, XXXIV Land Decisions, page 426, where the statutory life of the entry has expired at the date of suspension, such suspension does not give it a new life or afford the entryman opportunity thereafter to comply with the law.

Please make ruling as to whether this office is correct." [112]

By Act of July 1, 1902 (30 Stat. 728), a re-survey was directed to be made of townships 13, 14, 15 and 16 south, ranges 11, 12, 13, 14, 15 and 16 east, S. B. M. Prior to that date a large number of desert land entries had been made in such townships, in many, if not all of which the land entered was described in accordance with a private survey found not to agree with the original government survey and probably not with the re-survey to be made. Final proofs were made on many such entries, and final certificates issued thereon, but as much confusion was found to exist, it was found impracticable to issue patents thereon until after the re-survey shall have been made and the final entries adjusted to it. To facilitate such final adjustment as far as possible you were in-

structed by letter G of September 13, 1904, to accept final proofs in such entries in said townships when tendered, but "not to accept payment or to issue final papers until the matter of re-survey now pending has been finally adjudicated."

By telegram "E" of March 30, 1906, you were further directed to

> "Suspend entries in Townships thirteen to sixteen South, Range eleven to sixteen East, and in seventeen south, Ranges fifteen to sixteen East, S. B. M., after March 31, 1906."

This telegram was improperly worded, as it was not then intended that existing entries should be suspended, an entryman in that manner, relieved from compliance with the requirements of law during the period of such suspension. That telegram should have instructed you to receive and suspend all applications to enter presented after that date and the direction then given, in so far as that telegram can be construed, as a suspension of all entries in the townships named it as hereby revoked and you are now directed to receive and suspend without further action, all applications hereafter presented. [113] for entries in said townships, and you are further directed to at once notify all persons now holding entries of any character within said townships, upon which final proof has not yet been offered, that they will be expected to hereafter comply with the requirements of the law and make their proofs within the prescribed time. You are also directed that when final proofs are offered under any of these entries you will receive same, and if you find them otherwise cor-

rect, you will at once transmit them to this office and payment thereunder will not be required until after the surveys have been completed.

Very respectfully,
G. F. POLLOCK,
Acting Commissioner, [114]

"G"

DEPARTMENT OF THE INTERIOR.
General Land Office.
Address only the Commissioner of the
General Land Office.
Desert Land Entries. Imperial Valley.

Washington, D. C., May 24, 1907.

Register and Receiver, Los Angeles, California.

Sirs: By Act of July 1, 1902 (32 Stats. 728), a resurvey was directed to be made of townships 13, 14, 15 and 16 S., ranges 11, 12, 13, 14, 15 and 16 E., and fractional townships 17 S., ranges 15 and 16 E., S. B. M.

By telegram "E" of March 30, 1906, you were directed to

> "Suspend entries in townships thirteen to sixteen south ranges eleven to sixteen east and seventeen south ranges fifteen to sixteen east, San Bernardino Meridian, after March thirty-first nineteen hundred six."

By letter "G" of June 19, 1906, you were advised that said telegram was improperly worded, as it was not intended to suspend entries then existing and relieve entrymen in that manner from compliance with the requirements of the law during the period of such suspension; that it was intended to instruct you to

receive and suspend all applications to enter presented after that date, and you were accordingly directed

> "to receive and suspend, without further action, all applications hereafter presented for entries in said townships; and you are further directed to at once notify all persons now holding entries of any character within said township, upon which final proof has not yet been offered, that they will be expected to hereafter comply with the requirements of the law and make their proof within the prescribed time. You are also directed that when final proofs are offered under any of these entries, you will receive same, and if you find them otherwise correct, you will at once transmit them to this office, and payment thereunder will not be required until after the surveys have been completed."

The order of suspension of said lands from entry is hereby modified so as to permit desert land entry thereof the same as though the lands were unsurveyed.

No entry allowed subsequent to March 31, 1906, will be surveyed, or noted on plat of re-survey, and all applications for [115] entries filed subsequent to March 31, 1906, must describe the land with reference to the established lines of the original survey, to be adjusted by legal subdivisions to the lines of the re-survey when established; and after re-survey, the entryman will be required to make proof in the form of an affidavit, corroborated, showing the legal subdivisions of his claim.

The Register, before allowing a desert land entry

for lands in any of said townships, will endorse upon the claimant's application the following:

"Subject to adjustment by legal subdivisions to lines of resurvey authorized by Act of July 1, 1902."

Applications on file received by you under instructions of letter "G" of June 19, 1906, will be considered and acted upon by you in the order of their filing, and you will allow the applicants thirty days after notice within which to make entry of the land applied for, in accordance herewith.

Very respectfully,
R. A. BALLINGER,
Commissioner.

BOARD OF LAW REVIEW.
By H. J. GRAY.
J. W. WITTEN.
R. C. M. [116]

DEPARTMENT OF THE INTERIOR.
General Land Office.
Washington, D. C., July 19, 1907.

Register and Receiver,
Los Angeles, California.

Gentlemen:

For your information I enclose herewith a copy of office letter "G" of July 15, 1907, addressed to Mr. F. W. Lake of Oakland, California, relative to the allowance of entries and selections for lands in the Imperial Valley situated within your district.

Very respectfully,
FRED DENNETT,
Acting Commissioner.

DEPARTMENT OF THE INTERIOR.
General Land Office.
Washington, D. C., July 15, 1907.

Mr. Fred W. Lake,
909 Linden Street,
Oakland, California.

Sir:

Replying to your letter of June 25, 1907, in which you ask if the lands in the Imperial Valley "are withheld at this time from ordinary entry applying to surveyed lands," and also, if such lands are subject to State selection, you are advised that by the Act of Congress of July 1, 1902 (32 Stats. 728), a re-survey was directed to be made of townships 13, 14, 15 and 16, Ranges 11, 12, 13, 14, 15 and 16 East, and [117] fractional townships 17 S., ranges 15 and 16 E., S. B. M.

The local officers at Los Angeles were directed by office telegram "E" of March 30, 1906, to suspend all entries in the townships named, and, by letter "G" of June 19, 1906, to receive and suspend, without further action, all applications hereafter presented for entries in the said townships.

The instructions of June 19, 1906, were modified by office letter 'G" of May 24, 1907, so as to permit desert land entries for said lands the same as though same were unsurveyed, entry of unsurveyed lands being permitted under the desert land law.

A resurvey of the lands in question is now in progress, and until such resurvey has been made, and the plats thereof officially filed in the district land office, entries or selections, authorized to be made for sur-

veyed land only, should not be permitted.

Very respectfully,

FRED DENNETT,
Acting Commisisoner.

DEPARTMENT OF THE INTERIOR.
General Land Office.

Washington, D. C., August 8, 1907.

Register and Receiver,
Los Angeles, California.

Gentlemen: I am in receipt of your letter of July 24, 1907, relating to the proper disposition by you of applications to make entry for land situated within the territory known as the Imperial Valley. The Act of July 1, 1902 (32 Stats. 728), directed a resurvey of townships 13, 14, 15, 16 South, Ranges 11, 12, 13, 14, 15 and 16 East, and fractional townships 17 south, ranges 15 and 16 East, S. B. M.

By telegram "E" of March 30, 1906, this office directed you to

> "Suspend entries in townships thirteen to sixteen south, ranges eleven to sixteen east and in seventeen south, ranges fifteen to sixteen east San Bernardino Meridian, after March thirty-first, nineteen hundred and six."

Letter "G" of June 19, 1906, advised you that it was not intended, by the said telegram, to suspend existing entries or [118] relieve entrymen from compliance with the law during the period of such suspension, but that it was intended to instruct you to receive and suspend all applications to enter presented after the said date, and you were directed—

to receive and suspend, without further action,

all application hereafter presented for entries in said townships; and you are further directed to at once notify all persons now holding entries of any character within said townships, upon which final proof has not yet been offered, that they will be expected to hereafter comply with the requirements of the law and make their proof within the prescribed time. You are also directed that when final proofs are offered under any of these entries, you will receive same, and if you find them otherwise correct, you will at once transmit them to this office, and payment thereunder will not be required until after the surveys have been completed.

Under letter "G" of May 24, 1907, the order of suspension of said lands from entry was modified so as to "permit desert land entry thereof, the same as though the lands were unsurveyed."

In reply to a letter from Mr. F. W. Lake, of Oakland, California, asking if the lands in Imperial Valley "are withheld at this time from ordinary entry applying to surveyed lands," and, also, "if the said lands are subject to State selections," this office, under date of July 15, 1907, stated that

> a resurvey of the lands in question is now in progress, and until such resurvey has been made, and the plats thereof officially filed in the district land office, entries or selections, authorized to be made for surveyed lands only, should not be permitted.

A copy of the letter to Mr. Lake was sent you with letter "G" on July 19, 1907.

Your letter of July 24, 1907, states that you are

receiving and suspending all applications in that territory save desert entries which are received as though for unsurveyed lands, and that you did not understand that the letter to Mr. Lake "changes the situation." [119]

These lands occupy the status of unsurveyed lands, for which reason you have been authorized to accept desert land entries therefor. The lands will not be subject to ordinary entry or selection until resurvey and the plats officially filed. (Gen. Cir. January 25, 1904, p. 77). Rule 9 of the regulations of April 25, 1907, (33 L. D. 537), prescribes that where a list of State selections is received in the district office, by mail, prior to the date the lands applied for are open to settlement, entry, or selection, such list will be rejected as prematurely filed. The same action should be taken if such a list were so presented in person by an agent of the State, and I know of no reason why applications for entries authorized to be made for surveyed lands only should not be treated the same way.

While you may have been justified, in view of the language used in the instructions "G" of June 19, 1906, in receiving and suspending applications to enter or select the lands in question pending resurvey, yet, by a careful re-reading of said letter, it will be observed that it was written in response to an inquiry as to desert land entries exclusively, and the instruction given was only intended to apply to such entries.

You are accordingly directed to reject all pending applications (other than for entries and locations authorized to be made for unsurveyed lands) to enter

or select said lands, presented subsequent to March 31, 1906, and to take like action in the matter of applications hereafter presented.

Very respectfully,
FRED DENNETT,
Acting Commissioner.

DEPARTMENT OF THE INTERIOR.
General Land Office.
Washington, D. C., January 18, 1910.

Mr. Raymond H. Satterwhite,
Special Agent, G. L. O., c/o U. S. Land Office,
Los Angeles, California:

Sir: There are pending before this office a number of desert land applications for lands in the resurveyed townships in Imperial [120] Valley, which were rejected by decisions of the Register and Receiver of the Los Angeles land office from which appeals were taken. Actions on these appeals were deferred awaiting the completion of the resurveys under the Act of July 1, 1902. (32 Stats. 728.) As you are aware, of most of these townships the resurvey has been completed and the plats thereof filed. It is now very desirable to dispose of this accumulation of cases, of from 2 to 4 years standing for the most part, as rapidly and in as expeditious manner as possible, preserving, however, in every case a due regard to the legal and equitable question involved and to proper administration.

These cases differ, of course, in various details and particulars, but fall into two main classes, or groups, viz: (1) Applications in which the lands ap-

plied for were described according to the original Government survey of 1856, as near as possible, but which were rejected because of apparent conflict with other claims and entries, in which the same legal subdivisions of the original survey were described; (2) applications in which no attempt was made to describe the lands according to the original survey, but in which the lands were described in some other manner, namely, (a) by metes and bounds; (b) by the lines of the "Imperial Survey"; (c) by the lines of the so-called "Sunset Survey"; (d) by the lines of the resurvey, when still being made; (e) by the lines of the "Imperial Survey," or by the lines of the "Sunset Survey," or by the lines of the resuryev being made and by metes and bounds; and in which there was no apparent conflict, but which were rejected because the lands were not described according to the lines of the original survey, as required by instructions "G" of May 24, 1907.

In the first class, above described, the applicants contended that there were no actual conflicts, but that the conflicts were merely apparent, and would disappear as soon as the land could [121] be described according to the lines of the resurvey. In a number of this class of cases, the lands applied for have been surveyed out and segregated, and appear designated on the plats or resurveys under tract numbers. There seems to be no good reason why the application and other papers in such a case should not be remanded to the register and receiver, with instructions to proceed to pass upon the application to enter in the light of a resurvey and segregation of

the land as a tract, following the regular practice pursued in cases of desert land applications in the township.

It may be advisable to direct that there be required from the applicant proof of adjustment of the land applied for to the lines of the resurvey before the application is passed upon, yet this hardly appears necessary in view of the segregation of the land as a tract upon the plat of resurvey. A case of this sort is the desert land application of Frank A. Marek of Imperial, California, (Doc. D–7607), filed for lands described as the NW. ¼ of NE. ¼, NE. ¼ of NW. ¼ of Sec. 35, T. 15 S., R. 14 E., S. B. M., containing 80 acres, which was rejected on September 29, 1904, because the land applied for was covered by a desert land entry. From this decision, applicant appealed November 14, 1904. A plat of resurvey of T. 15 S., R. 14 E., S. B. M., was approved December 22, 1908, upon which there appears segregated as Tract 37, containing 79.86 acres, and free from conflict, the aforesaid land, designated as a desert land application.

In the majority of the aforesaid first class of cases, lands were not surveyed out and designated under a tract number on the plats of resurveys. Accordingly it is proposed in a case of this sort, to remand the application and other papers to the Register and Receiver, with instructions, to require the applicant to furnish proof of adjustment of the land applied for to the lines of the resurvey, and, after adjustment has been made, to proceed [122] to pass upon the application to enter, in the light of the proof of ad-

justment, following the regular practice pursued in in cases of desert land applications in the township. A case of this sort is that of the desert land application of Mary E. Norvell, of Holtville, California, (Doc. D–7043), for the N. ½ of NE. ¼ of Sec. 5 T. 16, S., R. 15 E., S. B. M., containing 78.80 acres, which was filed January 20, 1908, and rejected by the Register and Receiver on February 8, 1908, for the reason that the lands applied for were "included in a prior valid entry, under contest," and from which on March 9, 1908, applicant appealed. A plat of resurvey of T. 16 S., R. 15 E., S. B. M., was approved February 6, 1909, and filed May 24, 1909. In order to understand the second class of cases described, it is necessary to obtain familiarity with the instructions of "G" of May 24, 1907. These instructions were directed to the Register and Receiver and permitted desert land entries to be made in the townships described in the Act of July 1, 1902 (32 Stats. 728), the same as though the lands were unsurveyed, and provided with reference to such entries that

> "no entry allowed subsequent to March 31, 1906, will be surveyed or noted on the plat of resurvey, and all applications for entries filed subsequent to March 31, 1906, must describe the land with reference to the established lines of the original survey, to be adjusted by legal subdivisions to the lines of the resurvey when established; and after resurvey, the entryman will be required to make proof in the form of an affidavit corroborated, showing the legal subdivisions of his claim."

The said instructions were carefully considered and the requirement that applications must contain descriptions of the land with reference to the established lines of the original survey was placed therein as a necessary rule of administration, intended to prevent confusion in descriptions of lands applied for, resulting from private surveys of Imperial Valley lands, and to reduce the conflicts between claims to a minimum. Applicants [123] were not precluded from filing new applications in due form.

In a number of the aforesaid kind of cases, there have been returned to the Register and Receiver the applications and other papers in the cases, for their acceptance, after the applicants should have filed adjustment affidavits, describing their claims in accordance with the resurveys, and upon payment due, and in the absence of any objections of record. There has, however, been established no settled practice in these cases. In many of the cases, in which letters similar to the above described sort have been sent out, it has been found that the applicants had voluntarily submitted new applications in conformity with the instructions "G" of May 24, 1907, or properly describing the land according to the resurveys. This was done by applicants without awaiting decision on their original applications. Confusion is thus added to confusion, since there exists two pending applications by the one person for one tract of land.

Another, and possibly better plan, in such a case, would be to remand the application and other papers to the Register and Receiver, with directions to pass upon the application to enter in the light of a proof

of adjustment, which must first be filed, following the practice pursued in cases of Desert Land applications in the township. If another application should be found to have been filed by the same applicant for the same land, but under the resurvey, appropriate action could subsequently be taken towards combining the two cases into one under the same serial number.

The practice that is favored by this office, and the one it is strongly inclined to adopt, in regard to the applications rejected by the Register and Receiver because the lands were not described according to the lines of the original survey, as required by the instructions "G" of May 24, 1907, is to affirm the [124] decision of the Register and Receiver rejecting the desert land application, subject, of course, to the usual right of appeal to the Secretary of the Interior. In this way, these cases could be soon disposed of. If the applicant has filed or files another application for the land, described according to the resurvey, or in conformity with the instructions of May 24, 1907, said application can be treated as an entirely different case standing on its own bottom. In this connection, the proviso of section 1, of the Act of March 28, 1908 (35 Stats. 52), should receive consideration in regard to its application to this class of cases. This proviso is in words as follows:

> "That any individual qualifies to make entry of desert lands under said Acts, who has, prior to survey, taken possession of a tract of unsurveyed desert land, not exceeding in area 320 acres in compact form, and has reclaimed or has in good faith commenced the work of reclaiming

the same, shall have the preference right to make entry of such tract under said Acts in conformity with the public land surveys, within 90 days after the filing of the approved plat of survey in the District Land Office."

The 90 days period has, of course, expired in the resurveyed townships, but the pending applications would appear to sufficiently protect the applicants, if they desire to file new applications for the lands according to the lines of the resurveys.

Illustrative cases of the aforesaid sorts are as follows:

On January 4, 1908, William A. Keener, of Brawley, California, filed a desert land application (Doc. D–7065), for lands described only by metes and bounds, and containing 120 acres. The application was rejected on February 21, 1908, because the lands applied for were not described according to the lines of the original survey, as required by instructions "G" of May 24, 1907. On March 9, 1908, the applicant filed an appeal, which is pending. [125]

On March 12, 1908, George C. Reher, of Imperial California, filed a desert land application (Doc. D–7444, serial O1482), for lands stated to be in T. 14 S., R. 14 E., S. B. M., and containing 160 acres. In an attached statement the land was described as the SW. ¼ of Sec. 20, T. 14 S., R. 14 E., S. B. M., according to "the Imperial Land Company survey," which was stated to be an incorrect description according to the Government survey of 1856. The land was also described in said statement with reference to neighboring entries, as being one-half mile

south of the south line of desert entry No. 1518, belonging to J. C. Reher, assignee of William Horn, segregate on the plat of resurvey as Tract 101, T. 14, S., R. 14 E., S. B. M. It was stated further that desert land entry No. 2207, in the name of W. B. Brooke, resurveyed and segregated as Tract 102, adjoined the land applied for immediately on the west. A plat of resurvey of T. 14 S., R. 14 E., S. B. M., was approved December 22, 1908, and filed May 24, 1909. It appears from said plat that the land applied for, as nearly as can be ascertained without adjustment being made, is in conflict wholly, or partially, with Tract 133 of said township, which is the land of the homestead application of one John Tewell, according to the list and description of tracts in said township. The land applied for may also be in conflict with Tract 131, the rejected survey of school section 36, T. 14 S., R. 13 E., S. B. M. By their decision of April 15, 1908, the Register and Receiver rejected said application, and on April 27, 1908, the applicant appealed. The case has since been pending. The applicant stated that he had been since September 1, 1907, in full, peaceable and undisputed possession of said land and had prepared the same for reclamation and cultivation in compliance with the provisions of the desert land laws. [126]

Another case of the said class is the desert land application of Chester D. Bryan, of El Centro, California (Doc. D–7095), executed October 19, 1907, for land described by metes and bounds, with an additional statement that the same would be, when the section lines were run in the township, approxi-

mately, the E. ½ of SE. ¼ of Sec. 11, W. ½ of SW. ¼ of Sec. 12, NW. ¼ of N. W. ¼ of Sec. 13, NE. ¼ of NE.¼ of Sec. 14, T. 16 S., R. 14 E., S. B. M., containing 215.62 acres. This application was rejected by the Register and Receiver on October 22, 1907, because the lands were not described according to the lines of the original survey, as required by the instructions "G" of May 24, 1907. On November 13, 1907, the applicant filed an appeal which is pending. Under date of October 8, 1909 (09–107035), you reported that this application appeared to be in conflict with desert land entry No. 0626 of Charles E. Mead as to lot 2 and the NW. ¼ of NW. ¼ of Sec. 14, and with H. E. 06589, of Mary Holtz, as to lot 9, Sec. 11, and also in conflict with Tracts 117 and 122, embracing the lands of D. L. E. 2651, serial No. 022337, of Edmund H. Rockwood, assignee of James L. Thompson, and D. L. E. No. 3241, serial No. 0702, of Lela B. Titus, respectively. Said lot 9, Sec. 11, lot 2 and NW. ¼ of NW. ¼ of Sec. 14, were temporarily withdrawn by letter "G" of August 11, 1909, to the Register and Receiver as a result of your report and recommendation of July 22, 1909, that Miss Kate S. Parker, who, you stated, held State patent to school section 16, T. 16 S., R. 14 E., S. B. M., be allowed to select certain lands, including the aforesaid lands. This case shows very forcibly the numerous conflicts and complications that are bound to develop in many of these cases of applications pending on appeal.

Another sort of case is the desert land application

of Eva M. Girset, of Holtville, California (Doc. D–7106), filed December 23, 1907, for lands described by metes and bounds and [127] as the W. ½ of Sec. 30, T. 15 S., R. 1 5E., S. B. M., containing 320 acres, "according to the survey of said lands made by the Sunset Commercial Co." This application was rejected by the Register and Receiver on December 23, 1907, for the reason that the lands were not described with reference to the lines of the original survey, as required by letter "G" of May 24, 1907. On January 11, 1908, the applicant filed an appeal, which is pending.

Still another kind of case is that of desert land application (Doc. D–7073) of Mary P. Clarahan, of Holtville, California, filed on November 29, 1907, for lands described as the E. ½ of NE. ¼ of Sec. 21, W. ¼ of NW. ¼ of Sec. 22, T. 15 S., R. 16 E., S. B. M., containing 160 acres. This application was rejected by the Register and Receiver on December 3, 1907, as it appeared that said description was according to the lines of the survey made by the California Development Company and not according to the established lines of the original survey, as required by instructions "G" of May 24, 1907. On March 11, 1908, the applicant filed an appeal. It appears from the records of this office that sections 21 and 22, T. 15 S., R. 16 E., S. B. M., have been withdrawn under the first form of withdrawal authorized by the Act of June 17, 1902 (32 Stats. 388), section 21 having been so withdrawn by the Secretary of the Interior on April 2, 1909, and Section 22, which was withdrawn by the Secretary of

the Interior in January 31, 1903, under second form of withdrawal authorized by said Act, having been changed as to form of withdrawal from second form to first form by the Secretary of the Interior on April 9, 1909. The applicant stoutly maintained that it would be found, when the resurvey was completed, that the lands applied for by her were not within the withdrawn area. This case is pending.

In view of your familiarity with the conditions in the [128] Imperial Valley, it is desired that you report as early as possible your views and recommendations in regard to the best method to adopt in regard to the aforesaid cases, and the practice that would on the whole, in your opinion result in the least hardship and in equity to applicants and to other claimants whose claims may be found to be in conflict with the lands of said applicants.

Very respectfully,

FRED DENNETT,
Commissioner.

DEPARTMENT OF THE INTERIOR.
General Land Office.
Washington, October 13, 1910.

Register and Receiver,
Los Angeles, California.

Sirs: From the records of the many cases now pending in this office, involving claims to lands in the resurveyed townships in the Imperial Valley, it has been observed that, in numerous instances, there are two or more claimants to the same tract or tracts of land. Some of these contending claims are in opposition only on paper, and the controver-

sies can and will be tried and determined by the records. Other conflicts are more apparent than real, due to the heretofore uncertain identification of the various tracts of public lands in that locality, and these will be disposed of and eliminated by adjustment to the lines of the resurvey, a method of settlement which is being resorted to in all proper cases, and with which satisfactory progress has been made. It is apparent, however, that there are many other cases in which the adversary claims are asserted upon the ground, resulting in disputed possessions and rights of possession, and that, as to ~~those~~ this classes of claims, there can be no just determination until the rival claimants have been given opportunity to be heard and to submit evidence in support of their alleged superior rights, depending, as such rights must, upon priority of possession, or [129] superiority of right to that possession.

It is also manifest that, in the ordinary course of adjudication, this office will not, and cannot reach, take up for consideration, and examine all, or the most considerable part, of this last class of cases for yet many months, and that, if the usual course should be pursued, with a separate order for hearing in each and every such case, the result will be to indefinitely delay the final arbitrament of these disputes.

This office is exceedingly anxious that the condition of confusion and uncertainty affecting prospective titles to public lands in the Imperial Valley shall be speedily relieved, and the way made clear by

which the Government may proceed diligently to discharge its obligations to the settlers upon and claimants of said lands. In consonance with this desire, and in order to accomplish it, it has been determined that you should be, as you now are, directed to make due order for and proceed to a hearing in each and every case of such conflicting claims, in respect of which it shall be reported to you by Special Agent Satterwhite that such a hearing is essential, and this without further or other special or general direction from this office in that behalf.

It is deemed highly desirable, for reasons which have been sufficiently stated, that all hearings for which orders are made pursuant to this direction shall be given preference and precedence, in so far as may be proper, over all other contested cases, or hearings of any kind, which may now be pending before your office, or which may hereafter arise. And, if necessary, proper orders for continuances will be made and entered in all cases, over which these Imperial Valley cases are hereby given precedence. You will endeavor to enter such cases on your trial docket in consecutive order, setting as many down for each successive day as, in your judgment, can be conveniently and [130] properly held and disposed of on that day.

When the docket of these cases has been made up and completed, and when you have advised this office of the fact that it has been so completed, a trusted and competent representative will be detailed from this office to advise, counsel, and assist you in the further proceedings, all of which will be governed,

of course, by the Rules of Practice.

A copy of this letter will be supplied to Special Agent Satterwhite, who intends presently to return to Los Angeles, and ~~he~~ who will have been sufficiently instructed concerning his duty in the premises. You will confer with him, and together determine how best to execute this direction in such manner as to secure the object thereof.

Very respectfully,
(Signed) FRED DENNETT,
Commissioner,
J. McP.

BOARD OF LAW REVIEW.
By W. B. PUGH.

DEPARTMENT OF THE INTERIOR.
General Land Office.

Washington, D. C., January 2, 1913.

Register and Receiver,
Los Angeles, California.

Sirs: In reply to your letter dated December 2, 1912, relative to the suspension by letter "E" dated November 25, 1912, from all forms of disposal, pending the resurvey under the Act of July 1, 1902 (32 Stats. 728), the lands in certain townships in Imperial County, California; you are advised that the U. S. Surveyor has been directed to make a restoration resurvey if sufficient corners can be found whereon to base such method of resurvey.

If the lands embraced in pending entries in T. 16 South, R. 11 East, S. B. M., have been located with reference to the evidence of original survey corners, no segregation thereof will be necessary [131] and

no adjustment to the lines of resurvey will be required, since the evidence of said original survey will be recognized in the resurvey as defining the lands to which they were and are appurtenant.

The reason for the suspension is to permit the valid rights acquired prior thereto to be recognized in the resurvey and at the same time to prevent new rights to be subsequently acquired based upon the old survey of which the surveyor may not receive notice while the survey is being executed, and to recognize which would require subsequent survey and adjustment.

So far as these townships suspended for resurvey are concerned, they may be considered in the light of unsurveyed lands as related to settlement, and if settled upon while suspended, the subsequent entries must be adjusted to the new plats of resurvey when filed, the same as in cases of settlement upon unsurveyed lands.

Very respectfully,
FRED DENNETT,
Commissioner. [132]

The plaintiff then put in evidence the decision of the Register and Receiver of the U. S. Land Office in Los Angeles, dated April 29, 1913, the same being in the words and figures following, to wit: [133]

DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE.
Los Angeles, Cal., April 29, 1912.

CONFLICTING APPLICATIONS.

ETHEL HART
and
JOSEPH W. COX.

DECISION OF REGISTER AND RECEIVER.

March 1, 1909, Joseph W. Cox, of Brawley, Cal., filed desert land application No. 05545, for Tract 113, T.14 S., R. 15 E., S. B. M.

May 15, 1909, Ethel Hart, also of Brawley, Cal., filed desert land application No. 06196, for Tracts 113, 114 and the S. ½ of 115, T. 14 S., R. 15 E., S. B. M.

December 7, 1911, a hearing was ordered under authority of Commissioner's letter "G" of October 13, 1911, to determine the rights of the said parties. Notices were duly issued and hearing set for January 25, 1912, on which date trial was commenced and closed January 27. Both parties were present in person with counsel and submitted testimony.

It appears from the papers on file in the case that Cox first made an application for what is now the said Tract 113 by metes and bounds on July 17, 1907, which application was rejected and upon an appeal being taken said rejection was affirmed by letter "G" of July 13, 1909. It also appears that Ethel Hart made application July 30, 1907, for the NE. ¼ Sec. 13, T. 14 S., R. 14 E., S. B. M., and the NW. ¼ Sec. 18, T. 14 S., R. 15 E., S. B. M., which application was rejected by this office November 7, 1907, because

the lands described were included in prior valid entries. An appeal was taken from this rejection and action by the General Land Office on said appeal was deferred awaiting the completion of the resurvey of said townships under the act of July 1, 1902 (32 Stats., 725). After the filing of the official plat of resurvey, both parties made applications thereunder as above stated. The lands in controversy occupied the status of unsurveyed lands since April 1, 1906, by virtue of telegram "G" of March 31, 1906, pending the filing of plats of resurvey on February 23, 1909.

There is but little controversy as to the material facts in the case, and as developed at the hearing they are substantially as follows:

In November, 1905, J. W. Hart, father of the claimant Ethel Hart, caused a ditch or plow to be run around a 320-acre tract of land embracing the 160 acres in controversy and the 160 acres lying directly east thereof. He also posted a notice to the effect that Ethel Hart claimed the land. At [134] this time she was a minor and she did not reach the age of 21 years until the 30th day of the following January, 1906. On or about the 1st of February, 1906, she caused the work of reclamation to be commenced on the SE. eighty acres of the said 320-acre tract, the said eighty now being described as Tract 114 of said township and range under the resurvey. This work consisted of clearing and leveling said eighty acres, constructing the necessary ditches for irrigation and seeding the same to barley. There was also a small patch, about 4 acres, on the SE. forty

of the 160 in controversy, now described as Tract 113, said township and range, planted to barley at the same time, but this piece was neglected and did not make a crop or produce anything of value. The barley on the 80 acres mentioned matured and in August of that year was enclosed with a hog-tight wire fence and livestock fed upon it. Aside from the regular irrigation of the barley on the said Tract 114 and the construction of a fence around the same, nothing further was done on the said 320 acres until the 3d of November, 1906, when the claimant and her father went upon the land and set stakes for the purpose of marking out a head ditch along the east line of the land in controversy, and immediately to the west of the public road, which runs north and south between Tract 113 on the west and Tracts 114 and 115 on the east. They also at this time marked out lines for some borders to be constructed on the said tract 113. On the same occasion a brother of the claimant plowed a few furrows along the east line of said tract preparatory to constructing the head ditch contemplated, and also plowed a few furrows for borders, and a ditch along the south side of said tract.

November 8, 1906, claimant Joseph W. Cox moved a tent house on to the NE. corner of the tract in controversy, established his residence therein and laid claim to the said 160 acres. He saw the furrows which had been plowed along the east and south side of the tract, and within a day or two after making this settlement he was notified by the father of Miss Hart that she was claiming this 160 acres as a part of her 320 acre claim. Cox states that there were

no notices at the corners at the time he went on the land, and that a Mr. Ernst was claiming the land prior to this date, and that he, Cox, purchased Ernst's claim for a nominal consideration. The claim of Ernst, however, had not been reduced to possession and like the claims of sundry other persons of a similar character prior to that date, is not material to the issues in this case.

Cox lived on the premises from November 8, 1906, until March 15, 1909, when he was ejected by the sheriff of Imperial County as a result of a suit brought against him by Ethel Hart in the Superior Court of said county. During Cox's residence upon the land he grubbed out some of the greasewood, constructed a serviceable ditch a half mile in length along the east side of the tract, constructed fresno borders four rods apart on fifty or sixty acres of the southern portion of the tract, and plowed out lines for additional borders sufficient to cover another 40 acres. He also purchased 87½ shares of water stock which he endeavored to have placed on the land, but this was refused by the water Company because Miss Hart had already placed water stock on 40 acres of this tract. [135]

Though as above indicated there is but little contention between the opposing claimants as to the material facts in the case, as much cannot be said with respect to the opinion of opposing counsel as to the law applicable thereto. Each vigorously contends in arguments supported by numerous citations of authorities that his client has the superior legal as well as the superior equitable right to the land. The case

appears to turn on the construction that should be placed on the act of March 28, 1908 (35 Stat. 52). Counsel for Hart contends that the said act clearly gave her a preference right of 90 days after the filing of the official plat of resurvey in which to make entry of the entire 320 acre tract claims. This is strenuously opposed by counsel for Cox, who quotes the portion of said act applicable to the case as follows:

Provided, however, that any individual qualified to make entry of desert lands under said acts who has prior to survey *taken possession* of a tract of unsurveyed land, not exceeding in area 320 acres in compact form, *and* has reclaimed or has *in good faith* commenced the work of reclaiming the same, shall have the preference right, etc.

He also divides the said act into two essentials; possession and good faith, and contends that the party claiming THE benefits thereof must not only have taken actual possession of the land in question, but that he must also have commenced the work of reclamation in good faith neither of which essentials he contends, can be accredited to Miss Hart. We are not inclined, however, to question the good faith of Miss Hart. On the contrary we believe that so far as she is personally concerned she did act in good faith. Neither do we consider that there is any merit in the contention that her application should be rejected because she initiated her claim by marking out the exterior lines before she was 21 years of age. The work of reclamation was carried on in good faith after she became of age and for several months prior to Cox's appearance on the scene.

In our opinion this is the principle legal question involved in this case:

"Could a person qualified to make entry of desert land on or before February 1, 1906, go upon a tract of 320 acres, in the township in question, without having made application for a filing thereon, and by reclaiming and putting into cultivation 80 acres thereof, hold the entire 320-acre tract as against another duly qualified person who in the following November settled upon and claimed 160 acres of the tract in question?"

Prior to the passage of the act of March 28, 1908 (*supra*), there were no means by which a person could acquire a title or a preference right to a tract of land, surveyed or unsurveyed, under the desert land law other than by securing a filing thereon in the local land office. The said act of March 28, 1908, and Departmental regulations provided such a means by permitting a qualified person to take possession and commence and carry on the work of reclamation on a [136] tract of land that was unsurveyed or occupied the status of unsurveyed land and thereby gain a preference right of 90 days in which to file after the land became subject to filing. In this case the question is raised as to whether the said act of March 28, 1908, is retroactive. In our opinion it is, to the extent that a qualified person who had complied with its provisions prior to its enactment would be granted a preference right to the tract claimed, not exceeding 320 acres, in the absence of an adverse settlement claim or a superior possessory right not accompanied by settlement. But merely having

commenced the work of reclamation, without settlement, prior to the passage of said act, and without any color of title secured by legal filing or application to file, would not prevent a *bona fide* settler from establishing a residence upon and asserting claim to any portion of the tract, not exceeding 160 acres, in compact form, not actually reduced to possession.

Under a strict application of the law of possession, Miss Hart was not at any time prior to her application to file, made July 30, 1907, entitled to hold more than the 80 acres which she had placed under cultivation, against an adverse claim accompanied by settlement or a superior showing of possession. It is true that some steps had been taken, preliminary to commencing the work of reclamation on the 160 acres in controversy, before Cox's arrival on the ground, and about four acres of the same irrigated once and planted to barley, but this in our opinion was not sufficient to entitle her to possession even under the State laws to the entire 160 acres in controversy. The most that she would have been entitled to in any event would be the 40 acre legal subdivision upon which this four acres of barley was planted, but since it was neglected and allowed to die shortly after it commenced its growth, we are of the opinion that she acquired no rights to the 160 acres by the work done thereon which would defeat the settlement claim of Cox.

The action of the Superior Court of Imperial County in ousting Cox from this land is not binding upon this office, nor the Department, but was such as to excuse him for his failure to continue to reside

upon and cultivate the land in question. In our opinion Cox had acquired a legal as well as an equitable title to the land, at a time when Miss Hart had no right to hold it, and he should not have been dispossessed of the same. It is therefore recommended that the application of Joseph W. Cox, serial 05545, for the said Tract 113, T. 14 S., R. 15 E., S. B. M., be allowed, and that Ethel Hart's application be rejected as to the said tract and allowed as to Tract 114 and the portion of the Tract 115 applied for under Serial 06196, subject to her right of appeal to the Commissioner of the General Land Office within 30 days from receipt of notice of this decision.

HK

FRANCIS BOWEN,
Register.

O. R. W. ROBINSON,
Receiver. [137]

Also the relinquishment of James Boone Hoffman, which is marked Plaintiff's Exhibit 12, and is in the words and figures as follows, to wit:

Plaintiff's Exhibit No. 12.

RELINQUISHMENT.

Whereas, I did on the 1st day of November, 1900, make Desert Land Entry No. 1339 of the East half of Section 13, Township 14 South, Range 14 East, S. B. M., containing 320 acres in the Land Office at Los Angeles, California.

I hereby relinquish to the United States the east half of section 13, Township 14 South, Range 14 East, S. B. M., and I hereby authorize the Register and Receiver of the Los Angeles Land Office to

cancel my said entry on the books and records of their office.

Dated February 20, 1903.

JAMES BOONE HOFFMAN.

Duly acknowledged before R. D. McPherrin, Notary Public, San Diego Co., California, Feby. 20, 1903. Filed April 27, 1907. Frank C. Prescott, Register. [138]

The plaintiff then put in evidence the decision of the Honorable Commissioner of the General Land Office, the same being in the words and figures following, to wit:

By letter of September 4th, 1912, you transmitted the record in the above-entitled case, together with the appeal of Miss Ethel Hart from your decision adverse to her.

The record shows that on March 1st, 1909, Joseph W. Cox filed desert land application No. 05545, for Tract 113, T. 14 S., R. 15 E.

May 15th, 1909, Miss Ethel Hart filed desert land application No. 06196 for Tracts 113 and 114 and the S. ½ of Tract 115, T. 14 S., R. 15 E.

Oct. 13th, 1911, by office letter "G" a hearing was duly ordered.

Pursuant to instructions you gave the parties notice of a hearing before you for January 25, 1912, at which they appeared in person and by counsel and submitted testimony.

You found from the record that Cox first made an application for what is now Tract 113, by metes and bounds, on July 17, 1907, which application was rejected, and on appeal such rejection was affirmed

by office letter "G" of July 13, 1909, such decision afterwards becoming final.

It also appears that Miss Hart made application July 30, 1907, for the NE. ¼ sec. 13, T. 14 S., R. 14 E., and the NW. ¼ sec. 18, T. 14 S., R. 15 E., which application was rejected by your office November 7, 1907, because these lands were included in prior applications. An appeal was taken from such rejection and action thereon by this office was deferred awaiting the completion of the resurvey of said township, under the act of July 1, 1902 (32 Stat. 728). After the filing of the official plat of resurvey, both parties made application thereunder as hereinbefore noted.

The lands in controversy had occupied the status of unsurveyed land since April 1, 1906, by virtue of office telegram "G" of March 31, 1906, pending the filing plats of resurvey on February 23, 1909.

As to the facts in the case, you found that in November, 1905, J. W. Hart, father of Ethel Hart, and for her, caused a ditch or plow furrow to be run around a 320 acre tract of land embracing the 160 acres in controversy and the 160 acres lying directly east thereof. Hart also posted a notice to the effect that Ethel Hart claimed this 320 acre tract of land. At this time Miss Hart was a minor, and she did not reach her majority until January 30, 1906. On or about February 1, 1906, Miss Hart began the reclamation of the southeast 80 acres of the said 320 acre tract, the said 80 now being described as Tract 114, of said township and range, under the resurvey. This work consisted of clearing

and leveling said 80 acres, constructing the necessary ditches for irrigating and seeding the same to barley. There was also a small patch of some 5 acres on the southeast forty of the 160 acres in controversy, now described as Tract 113, said township and range, planted to barley at the same time, but this small piece was neglected and it did not produce a crop of much value. The barley on the 80 acres matured in August of that year, and was enclosed with a fence. Aside from the regular irrigation of the barley on tract 114, and the [139] construction of a fence around the same, nothing further was done on the 320 acres until November 3, 1906, when Miss Hart and her father went upon the land and set stakes for the purpose of marking out a head ditch along the east line of the land in controversy and immediately to the west of the public road, which road runs north and south between Tract 113 on the west and tracts 114 and 115 on the east. She also marked out lines for borders to be constructed on tract 113, and she caused furrows to be plowed along the east line of said tract 113 preparatory to the construction of a head ditch, and also plowed furrows for borders and a ditch along the south line of said tract.

On November 8, 1906, Joseph W. Cox moved a tent-house on to the northeast corner of the tract in controversy, established his residence therein and laid claim to 160 acres. At that time Cox saw furrows which had been plowed along the east and south sides of said tract, and shortly after making this settlement he was notified by the father of Miss Hart that

she was claiming the 160 acres as a part of her 320-acre tract. Cox testified that he saw no notices at the corners of the land when he went there, and that a man by the name of Ernst was then claiming the land, and that he, Cox, purchased Ernst's claim for $5.00. The claim of Ernst's was not reduced to possession and he had nothing he could transfer to Cox or anyone else, as suggested by you. Cox lived on tract 113 from November 8, 1906, to March 15, 1909, at which last date he was ejected therefrom by the Sheriff of Imperial County, as a result of a suit brought against him by Miss Hart, in the Superior Court of said county. During Cox's stay on the land he grubbed out some of the greasewood, constructed a ditch a half a mile in length along the east side of said tract, constructed Fresno borders on 50 or 60 acres of the southern part of the tract, and plowed out lines for additional borders sufficient to cover another 40 acres. He also purchased eighty-seven and one-half shares of water stock which he sought to have placed on the land, but this was refused by the water company because of the fact that Miss Hart had already placed water stock on 40 acres of tract 113.

While the testimony is quite voluminous you found that the material facts in the case are not conflicting, the disposition of the case turning on the construction to be given to the Act of March 28, 1908 (35 Stat., 52), counsel for Miss Hart claiming that said act clearly gave her a preference right of ninety days after the filing of the official plat of resurvey in which to make an entry for the 320 acres claimed

by her. Miss Hart's claim is opposed by Cox who seeks to divide said act into two essentials; possession and good faith. He contends that the party who would claim the benefits of said act must not only have taken possession of tract 113, but that he must also have commenced work of reclamation in good faith, neither of which essentials, he contends, was shown by Miss Hart.

In passing upon the mixed question of law and fact you say:

We are not inclined, however, to question the good faith of Miss Hart. On the contrary, we believe that so far as she is personally concerned she did act in good faith. Neither do we consider that there is any merit in the contention that her application should be rejected because she initiated her claim by marking out the extreme lines before she was 21 years of age. The work of reclamation was carried on in good faith after she became of age and for several months prior to Cox's appearance on the scene. [140]

As to the law of the case you found that prior to the passage of the Act of March 28, 1908, there were no means by which a person could acquire a preference right to these lands surveyed or unsurveyed, other than by securing a filing. That the said act and departmental regulations prove such a means by permitting qualified persons to take possession and commence to carry out the work of reclamation of lands unsurveyed, or which occupied the status of unsurveyed lands, and thereby gave a preference right of ninety days in which to file after the lands

became subject to filing and entry. That in this case, the question arises as to whether said Act of March 28, 1908, is retroactive. That, in your opinion, it is retroactive to the extent that a qualified person who has complied with its provisions prior to its enactment would be granted a preference right to the tract so claimed, not exceeding 320 acres, in the absence of an adverse settlement claim or a superior possessory right not accompanied by settlement. But that merely having commenced the work of reclamation, without settlement, prior to the passage of the act and without color of title secured by legal filing or application to file, would not prevent a *bona fide* settler from establishing a residence upon and asserting a claim to any portion of the tract not exceeding 160 acres, not actually reduced to possession.

You found that the action of the Superior Court of Imperial County, which ousted Cox from this land, is not binding upon you, but was such as to excuse Cox for his failure to continue to reside upon and to cultivate the land claimed by him and now in dispute.

Notwithstanding the facts that you found that Miss Hart went into possession of the 320 acre tract, and was reclaiming it in perfect good faith you held that Cox, with actual notice of her claim and right, may take possession, and by residence thereon, dispossess her of 160 acres of her claim.

It follows logically, that if Cox can take 160 acres of Miss Hart's claim in this way, then Smith or Jones, or both, may pitch their tents on the other

part of her claim, and obtain a superior right to the land actually reclaimed.

It is noticed that in holding that the work of the reclamation, without settlement, would not prevent a bona fide settler from establishing a residence and asserting a claim, etc., as held by you, the question becomes pertinent in this connection as to the *bona fides* of Cox in settling on land improved and in the known possession of another. Was Cox a *bona fide* settler? It is true, as you state, that the judgment and decision of the Superior Court of Imperial County, ousting Cox from possession of the land in dispute, at the suit of Miss Hart brought for that purpose, is not binding on you or the department; but as the case was thoroughly tried by the court to a jury, a judgment and decision, between the same parties, upon the identical issues involved here, are highly persuasive of being just and right. The same witnesses testified in that case as in this, and under instructions by the court as to the law governing the case, the jury found that Cox was not entitled to the possession of the land claimed by Hart and that Hart was so entitled.

The act of March 28, 1908, provides, in part, as follows:

> Provided, however, that an individual qualified to make entry to desert lands under the said acts who has, prior to survey, taken possession of a tract of unsurveyed land, not exceeding in area 320 acres in compact form, and has reclaimed or has in good faith *commenced the work*

of reclaiming the same shall have a preference right, etc. [141]

You found that as a matter of fact, and your finding in this respect was fully reflected by the testimony in the case, that Miss Hart, in good faith, commenced the reclamation of Tract 113, the land in dispute, long prior to the date that Cox sought to establish a residence on the tract, and that Cox knew these facts when he took possession.

To me it seems as Miss Hart had met every requirement of the act in question to entitle her to a preference right of entry, the act is not ambiguous as its provisions are plain and easy to understand. It provides that if an individual qualified to make a desert entry takes possession of a tract of unsurveyed land, not to exceed 320 acres, and has in good faith commenced the work of reclaiming the same, shall have a preference right, etc. It is conceded that these lands occupied the status of unsurveyed lands. It it admitted that Miss Hart is qualified to make a desert entry. It is also admitted that she has commenced the work of reclaiming the lands in dispute. In fact, she has already irrigated about 5 acres of the land in dispute and planted it to barley, and you found that she had acted in perfect good faith. What else could she do to insure her a preference right of entry? Certainly she could not be required to improve each and every part of these 160 acres before she would be immune from trespassers and claimants. She had run furrows around the land and she claimed 320 acres which includes the 160 acres in dispute. She had also leveled and bordered some

85 acres of the ground so marked out, 5 acres of which is a part of the land in dispute, and she has purchased water stock and brought water to all this cleared land and had irrigated the same.

You found that Miss Hart had acted in perfect good faith, and the record of the testimony so shows, and it is not disputed, but that Cox saw all these improvements when he erected his tent on Miss Hart's claim,—in fact he tore down some of the borders erected by Miss Hart. If Cox can legally take and retain possession of the land in dispute, he could just as legally have taken possession of the other 160 acres, when he would have found 80 acres improved and irrigated instead of five.

It seems that when Congress passed the Act of March 28, 1908, it intended to protect the rights of persons in the condition as Miss Hart is situated. After this act had been passed this office repeatedly held that its effect was retroactive, not in a limited sense, not in part, as held by you, but in a broad and common-sense view of giving effect to clear intention of Congress and protect those who had commenced the reclamation of unsurveyed lands, not exceeding 320 acres in extent, from all intruders upon any part of said tract until they had opportunity to reclaim the same and for this purpose a preference right was given.

The identical questions at issue in this case have been before this office and the department heretofore, which facts you must have overlooked. In the case of Virgil Patterson (40 L. D. 254), decided by the department, and the case of Rachel M. Hart, decided

by this office on January 29, 1912, Los Angeles 06195, are cases in point. These two decisions affected two tracts of land lying south of the land involved in this case. So far as the surveys are concerned, they were situated exactly the same as the land of Miss Ethel Hart. They were in what was known as the "excess strip." The parties did less work than [142] did Miss Hart to reclaim the land. Nevertheless, your decisions in these cases were reversed, in refusing them the right to file.

In the case of Virgil Patterson, *supra,* it appears that Patterson had expended some $350.00 in constructing ditches and borders upon the 160 acres claimed by him, and on May 1, 1908, he sought to file on the land, but was informed by the local officers at Los Angeles that said lands were not then open to entry, but that he might secure a preference right by improving the same, which he did. and he filed his application within two weeks after the filing of the resurvey plats. Your decision denying him the right to file was affirmed by this office but reversed by the Department. In that case, this office held that no such acts of settlement were shown as would constitute Patterson a *bona fide* settler unde rthe homestead laws. The Department held, syllabus:

Desert Land Entry—Unsurveyed Land Act of March 28, 1908.

The possession and improvements contemplated by the Act of March 28, 1908, offering a preference right to make desert land entry to one who has taken possession of a tract of unsurveyed desert land, and has reclaimed or has in good faith commenced the

work of reclaiming the same, are not such as required of a settler under the homestead law, but it is sufficient under that act if the possession and improvement conforms to the requirements of the desert land law, and evidence the party's good faith under that law.

No language of a judicial tribunal could more clearly treat the facts in the case at bar than the language of the department in the case cited above.

You, in effect, held that because Miss Hart had not fully and completely reclaimed tract 113, the land in dispute, that she is not entitled to file on that part of her claim. Your decision runs counter to both the provisions and spirit of the Act of March 28, 1908. It is in opposition to, and in conflict with, the departmental holding in an exactly similar case,—Virgil Patterson, *supra,* which seems to be conclusive of the case at bar.

As the questions of fact are fairly clear from dispute in this case, the remaining question is one of law, under said facts, and it is my opinion, and I so hold, that Miss Ethel Hart has, by her acts of improvement, irrigation, and cultivation of the 320 acre tract claimed by her, become entitled to preference right of entry.

Accordingly, your decision is reversed, the application of Joseph W. Cox for Tract 113, T. 14 S., R. 15 E., is rejected, subject to the right of appeal.

In the event of this decision becoming final, Ethel Hart will be permitted to perfect her desert land application. [143]

And also the decision of the Honorable Assistant

Secretary of the Interior, which appears at Volume 42 of Decisions of the Department of Interior, at page 592, the same being in the words and figures, following, to wit:

Jones, First Assistant Secretary:

Appeal is filed by Joseph W. Cox from decision of December 7, 1912, of the Commissioner of the General Land Office reversing the [illegible]ion of the local officers and rejecting his application filed March 1, 1909, to make desert land entry for resurveyed tract 113, township 14 S., R. 15 E., Los Angeles, California, land district, for the stated reason that Ethel Hart who filed May 15, 1909, application to make desert land entry of said tract together with resurveyed tract 114, and the S. ½ of resurveyed tract 115, same township and range, said application by her being filed within ninety days after filing plat of resurvey of said lands under the act of July 1, 1902 (32 Stat. 728), has preference right, under the act of March 28, 1908 (35 Stat. 52), to make desert land entry for said resurveyed tract 113.

Since April 1, 1906, these lands have been recognized and considered by virtue of office telegram "G" of March 31, 1906, as having the status of unsurveyed lands pending the filing of plat of resurvey, which was filed February 23, 1909.

Hearing was duly had herein, at which both parties appeared with counsel, and a large amount of testimony was presented by both sides. The local officers and the Commissioner have concurred in finding that there is practically no dispute as to the facts in the case. They found that Hart first went upon the

lands in conflict, and upon those supplied for by her and not in conflict, shortly before or shortly after, which is immaterial, she became 21 years of age February 1, 1906, and enclosed the lands now applied for by her, approximately 320 acres, with a plowed ditch or furrow and placed notice of her claim to such lands and thereafter in the same year did considerable reclamation work on said other lands not now in conflict, and on November 3, 1906, staked out on the lands now in conflict a head-ditch and borders and had furrows plowed along the east line between said lands now in conflict and said tracts 114 and 115 and along the south line of said lands in conflict. She does not appear to have done anything further on the latter lands since then until after March, 1909.

On November 8, 1906, Cox moved a tent-house upon said lands in conflict, established residence therein, claiming those lands, and resided there and prosecuted further improvements and reclamation work thereon until ejected therefrom March 15, 1909, at Hart's suit in the Superior Court of Imperial County, California, his appeal from the adverse judgment in which is yet pending.

On July 17, 1907, Cox filed desert land application for said lands now in conflict, describing same by metes and bounds, and on July 30, 1907, Hart filed her desert land application intending to be for said lands but containing a description in terms of the old survey thereof, made in 1856, the lines of which had been obliterated, which description as given related to the lines of a private survey erroneously supposed to be a retracement of said old survey but was in fact

descriptive of other lands which had already been entered, under such description by other parties. [144]

In accordance with the practice then in force, requiring that applications for entry in this locality should be by the lines of the old survey, Cox's application was rejected, and said rejection affirmed on appeal, and on the filing of his present application his former application was held to be abandoned, as was Hart's first application held to be by the filing of her present application.

The local officers held that Cox had, by actual settlement and occupation and by his first application filed after the filing of the resurvey plat, both legal and equitable title to the said land in conflict, and that Hart had no sufficient acts on said land in conflict to bring her within the benefit of said act of March 28, 1908, allowing a preference right, after survey, to make desert land entry to persons who had prior to survey taken possession of and reclaimed or in good faith commenced reclaiming unsurveyed desert lands. The Commissioner on appeal held that Hart is entitled on the facts to such preference right under said act.

These lands, although given by the land department the status of unsurveyed lands pending their resurvey under said act of July 1, 1902, were in fact surveyed lands, under the stated old survey of 1856, and said act of March 28, 1908, had no application whatever to said lands. Henderson T. Dizney et al. (41 L. D. 257.)

The present case is distinguishable in several re-

spects from that of Virgil Patterson (40 L. D. 264), relied upon in the decision appealed from as authority for holding that said act of March 28, 1908, confers a preference right in this case. The acts of performance on the land in that case were subsequent to the passage of said act and there was no adverse private interest involved, the conflict therein being with a subsequent withdrawal of the land for Government use. Under such circumstances equitable considerations existed why the Government should not allow its own withdrawal to prejudice perfection of Patterson's claim and why he should be considered as having a preference right under said act and the rule of the land department that said lands occupied the status of unsurveyed lands. No such conditions exist in this case, which is one of conflicting private interests only and determinable under the law in force when such conflict arose.

Prior to the passage of said act of March 28, 1908, no desert land right could be initiated, upon lands surveyed or unsurveyed, except by the filing of an application. The complicated and confused situation existing in this locality with reference to what is called the "excess strips" within which these lands are located, is fully set forth in the Department's decision in the case of Stephenson vs. Pashgian (42 L. D., 113). As shown therein, the required description, in an application, of land by the old survey was an impossible condition, and a description by metes and bounds the only feasible one. Cox's application, made by metes and bounds, was in fact a proper application

and but for such mistaken requirement by the land department should have been allowed. His claim was substantially good and valid, and, as in the case last above referred to, the Department is not disposed to hold that he is now prejudiced in the consideration of his case by failing then to appeal further to the Department. He is first in right by reason of being first in the filing of a proper application, both pending the resurvey of said lands and after the filing of the resurvey plat. His application should, therefore, be allowed and that of Hart rejected as to the land in conflict.

The decision appealed from is accordingly reversed.

A. A. JONES,
Assistant Secretary. [145]

The plaintiff then put in evidence her protest against the final proof of Joseph W. Cox, filed in the U. S. Land Office at Los Angeles, California, November 25th, 1916, in the words and figures following, to wit:

Serial No. 02759.

DEPARTMENT OF THE INTERIOR.
UNITED STATES LAND OFFICE.
EL CENTRO, CALIFORNIA.

ETHEL HART,

Protestant,

vs.

JOSEPH W. COX,

Protestee.

PROTEST AGAINST FINAL PROOF.

Comes now Ethel Hart, above named, whose post-office address is Fairmont Apartments, East San Diego, California, and protests *again* the acceptance of the final proof of Joseph W. Cox of Desert Land Entry 02759, El Centro Land Office, for Tract 113, T. 14 S., R. 15 E., S. B. M., on the following grounds:

I.

That the said Joseph W. Cox does not own and control, or have a clear right to, the use of water sufficient to irrigate the whole of said land and to keep the same permanently irrigated.

II.

That the said Joseph W. Cox has not constructed ditches on said land for the irrigation thereof; and that he has not provided any means whatever for conducting water to and over said land.

III.

That the said Joseph W. Cox has not made the expenditure of $3.00 an acre towards the reclamation of said land, in compliance with the legal requirements.

V.

That the said Joseph W. Cox has not contracted water upon said land with a view to the proper reclamation thereof.

VI.

That the said Joseph W. Cox has not cultivated said land by actual tillage of the soil or by the planting of crops.

VII.

That the said Joseph W. Cox has not planted or

produced an agricultural crop or any crop of one-eighth of the area of said land, or any part thereof.

VIII.

That the said Joseph W. Cox has not reclaimed said land.

IX.

That the said Joseph W. Cox has not performed any act which entitled him to make final proof of said land.

Wherefore, protestant prays that the final proof of said Joseph W. Cox, set for November 28, 1916, at the El Centro Land Office, be rejected and that final certificate to said entry be denied.

ETHEL HART.

Subscribed and sworn to before me this 25th day of November, 1916.

[Seal] CHARLES C. DUNN,
Notary Public in and for the County of Los Angeles, State of California. [146]

Plaintiff introduced in evidence her application to contest the Desert Land Entry of defendant, which application was filed in the land office at El Centro, California, November 25, 1916, and is in the words and figures following, to wit: [147]

APPLICATION TO CONTEST.

DEPARTMENT OF THE INTERIOR.
UNITED STATES LAND OFFICE.

Copy

Los Angeles, California, November 25, 1916.

Received
U. S. Land Office
El Centro, Cal.
Nov. 27, 1916.
Serial No. 02759.
Contest No. 90.

I, the undersigned, Ethel Hart, residing at Fairmont Apartments, East San Diego, Cal., being duly sworn, upon my oath state: That I am well acquainted with the tract of land embraced in Desert Land Entry, Serial No. 02759, made on March 4, 1914, by Joseph W. Cox, whose present place of residence is Brawley, State of California, for the Tract 113, Section ——, Township 14 S., R. Range 15 E., S. B. Meridian, and know the present condition of the same; that said land is desert agricultural in character; that in so far as I know the said entry is the only proceeding now pending for the acquisition of title to said land.

1.

That the said Joseph W. Cox has not made the required expenditure of $1.00 an acre each year since date of entry, towards the reclamation of said land, or at any time; and that he has made no expenditure whatever towards the ultimate reclamation of said land.

II.

That the foregoing described entry of Joseph W. Cox is invalid in that it was erroneously and improperly allowed, the contestant, Ethel Hart, having been in possession and engaged in the reclamation of said land and being qualified to make entry thereof at the time said Joseph W. Cox first asserted claim thereto, and at the time his said entry was initiated [148] and at the time it was allowed; that the said Ethel Hart was the first to take possession of said land and commence the reclamation thereof, and was engaged in the work of reclamation of said land when the said Joseph W. Cox first attempted to take possession and make entry thereof.

III.

That the said Ethel Hart, being at all times herein mentioned, and now, qualified to make entry under the desert land laws of the United States, went upon said land and took actual possession thereof about February 1, 1906, with the intent and purpose to reclaim the same under the provisions of the desert land laws, and that she commenced the work of reclamation thereof; that thereafter and until on or about the 8th day of November, 1906, she continued in the actual possession of said land, and on said last mentioned date the aforesaid Joseph W. Cox clandestinely, forcibly and unlawfully took possession of said land and continued in possession thereof until February, 1909, when said Joseph W. Cox was dispossessed by a writ of possession issued out of the Superior Court of the County of Imperial, State of California, in an action wherein said Ethel Hart was

plaintiff and said Joseph W. Cox was defendant, which said action was one in ejectment brought to recover possession of said land; and a judgment was rendered and entered in said action by said Superior Court on February 10, 1909, in favor of the plaintiff, Ether Hart, and against the defendant therein, Joseph W. Cox, that said Ethel Hart do have and recover of and from said Joseph W. Cox possession of the premises herein referred to, and which judgment was thereafter, on the 22d day of November, 1915, affirmed by the Supreme Court of the State of California (171 Cal. 364); that ever since February, 1909, said Ethel Hart has remained and still is in the actual and exclusive possession of all of said land and has never abandoned the same; that she has made more than the expenditure of $3.00 an acre required by law towards the reclamation of said land; that she has acquired a water right for the reclamation of said land; that she has reclaimed and cultivated to crops the entire area of said land for more than seven years preceding the date of this contest; that she has paid all state, county and other taxes on said land for eight years preceding the date of this contest; and that she is now in the undisturbed possession of said land and has fully reclaimed the same so as to entitle her to make entry and final proof of, and to receive patent to, said land.

IV.

That the said entry of said Joseph W. Cox is invalid for the further reason that said Joseph W. Cox has done no act to entitle him to make entry and final proof of said land and to receive patent thereto; that

he has never performed any work or made any expenditures towards the ultimate reclamation of said land; that he has not been in possession of said land, or any part thereof, since February, 1909; that he has never irrigated or cultivated said land; and that he has done nothing whatever upon said land towards its reclamation, [149] cultivation or improvement since date of entry, and has wholly abandoned said land an has exercise no act of ownership with respect thereto since date of entry.

V.

That the said entry of Joseph W. Cox was not made in good faith, as shown by the foregoing allegations, but that he is merely holding his claim thereto for speculative purposes, in case he should succeed in clearing the record of other claims.

VI.

That the said Ethel Hart is entitled to make entry of said land by reason of her prior and better right thereto, and by reason of the lack of good faith, right, possession and reclamation of said Cox.

That I claim an interest in or desire and intend, if permitted to do so, to acquire title to the said land under the provisions of desert land law, and state the following facts which show my qualifications to do so; I am not under the age of twenty-one years; I am a citizen of the United States, or have declared my intention to become such; I have not heretofore made any entry which would disqualify me from making entry under the above-mentioned law; I have not since August 30, 1890, acquired title to, nor am I now claiming under any of the agricultural land laws, an

amount of land which together with the land described above, or the part thereof which I desire to enter, will exceed in the aggregate 320 acres, and I am not the proprietor of more than 160 acres of land in any State or Territory; and I further swear that this contest is not being collusively or speculatively initiated, but is being instituted and will be diligently prosecuted in good faith for the sole privilege of acquiring title to said land or some part thereof in my own and sole interest.

I therefore ask that I be permitted to prove the allegations made in this affidavit at such time and place as may be named therefor, and that after proving said allegations, and my payment of all the costs incurred in this proceeding, I be permitted to make entry of said lands or a part thereof, under the laws above specified.

I desire that all papers affecting this contest be served upon me at the following address: Care, C. R. Naff, 406–411 International Bank Bldg., Los Angeles, Cal.

ETHEL HART.

I hereby certify that the foregoing affidavit was subscribed and sworn to before me by the affiant named therein, after it had been read to or by him, in my presence, in Los Angeles, California, on this 25th day of November, 1916, be, the said affiant having been fully made known to me as such person by C. R. Naff, of 406-411 International Bank Bldg., Los Angeles, Cal., who is well known to me.

[Seal] CHARLES C. DUNN,
Notary Public in and for the County of Los Angeles, State of California. [150]

It appeared that, at the same time plaintiff filed her application to contest as aforesaid, she filed the corroborating affidavit of John W. Hart, which was in the words and figures following, to wit:

Also appeared, at the same time and place, John W. Hart, residing at East San Diego, California, and —— residing at ——, who being duly sworn, depose and say: That he is acquainted with the tract described in the above affidavit, and know from personal knowledge and observation that the statements therein made are true. That affiant has often seen and has been upon said land, and knows from personal observation that said Ethel Hart first went upon said land, and that she has done the only work of reclamation which has been performed on said land; and that said Joseph W. Cox has done nothing whatever towards the reclamation of said land.

JOHN W. HART.

I HEREBY CERTIFY that the foregoing affidavit was read to or by affiants in my presence before affiants affixed signatures thereto; that affidavits have been satisfactorily identified before me by C. R. Naff, of 406-411 International Bank Building, Los Angeles, California; and that the said affidavit was duly subscribed before me at Los Angeles, California, this 25th day of November, 1916.

CHARLES C. DUNN,
Notary Public in and for the County of Los Angeles, State of California. [151]

Thereupon the plaintiff rested, and the defendant introduced the following evidence, to wit:

Testimony of Frank C. Prescott, for Defendant.

FRANK C. PRESCOTT, sworn as a witness for the defendant, testified as follows:

Defendant here put in evidence a certified copy of the tract book of the United States Land Office, at El Centro showing the entries on Section 13, township 14 south, range 13 east, S. B. M., such record showing an entry on the east half of section 13, in T. 14 S., R. 14 E., S. B. M., made by James B. Hoffman, December 1st, 1900, and that the same was canceled by a relinquishment, May 6th, 1907, and that the application for the same land was applied for by Fannie L. Harding, May 28, 1907, and her entry allowed June 12th, 1907, and that her entry was canceled by a relinquishment September 18th, 1909. Also that Ethel Hart filed a desert land application for the said land on July 30th, 1907, and that the same was rejected and appeal taken to the General Land Office.

The attention of the witness was then called to the record, and he testified that he had no recollection, either of Miss Ethel Hart, or of the particular land in controversy. That he never informed anyone that the land in the condition shown by the record as the northeast quarter of section 13 could be obtained by going upon the land and reclaiming the land. My uniform statement to persons making inquiry as to what they could do was that the same could not be acquired otherwise than by a contest and cancellation, or by a relinquishment.

Cross-examination.

My term began January 1st, 1906, and terminated

(Testimony of Frank C. Prescott.)

January, 1910. After the passage of the Act of March 28th, 1908, persons were probably advised by me that the right to unsurveyed land under the desert land act could be acquired by taking [152] possession and complying with the law, but not as to land as to which there was a valid existing entry.

It was here stipulated that after the coming in of the resurvey, made under the Act of 1902, in Imperial Valley the Land Department in accordance with the statute permitting amendments where a man had misdescribed the land he really wanted to enter, with great liberality permitted the entryman to adjust their entries by amendment to the lands that they actually desired, where there was no intervening adverse right.

There was a large number of people presenting us maps showing legal surveys, and we refused to discuss such matters with them, and told them the only records we would consider were United States surveys, and that we would not discuss any land based upon private survey, or any other map at all. We sometimes would say to people that possession and reclamation were very strong matters in his favor and that if one did not collide with some valid existing entry doubtless the Government would give him some sort of consideration.

During the year 1907, I would not accept any application presented by metes and bounds. All such applications were rejected at once.

It is here stipulated that James B. Hoffman, while making a legal claim by his entry of the Northeast

(Testimony of Frank C. Prescott.)

quarter of Section 13, as shown by the afore-mentioned records he went on the ground claimed, a piece of land two miles away from the land here in dispute and continued to assert such claim to land two miles away during all of the time he had the entry of record, and that at the time Fannie L. Harding made her entry, while she described her land as the northeast quarter of section 13, as a matter of fact [153] she went upon a piece of land two miles away from the land in question and laid claim to it, and that she and her successors in interest asserted such claim to different lands and adjusted or amended, as you might want to use the expression, to different land two miles away from this land in question. That none of these parties, neither Hoffman nor Harding, nor their successors in interest ever asserted on the ground any claim to Tract 113, 114 or 115.

It was further stipulated that none of the parties who appeared on the records *to* have made filings on the northeast quarter of section 13, township 14, south, range 14 east, and the west one-quarter of section 18, township 14 south, range 15 east, S. B. M., made any claim to any part of the land which was described on the map of the resurvey as Tracts Nos. 113, 114 and 115, except in so far as their filing might be deemed a claim to the same, and that each of said persons occupied and claimed other and different lands, under their said filings.

Defendant offered in evidence the answer of Joseph W. Cox to the affidavit of contest filed against him by Ethel Hart, the same being received by the

(Testimony of Frank C. Prescott.)

United States Land Office on December 6th, 1916, and is in the words and figures following, to wit:

[154]

(Rubber stamp:)
Received
U. S. Land Office
El Centro, Cal.
Date 12/6/16.
Hour 2:30 P. M.

UNITED STATES LAND OFFICE,

DEPARTMENT OF THE INTERIOR,
EL CENTRO, CALIFORNIA.

Contest #90.

ETHEL HART,

Contestant,

vs.

JOSEPH W. COX,

Contestee,

ANSWER TO AFFIDAVIT OF CONTEST.

State of California,
County of Imperial,—ss,

Joseph W. Cox, being duly sworn, says: That he is the contestee in the above-entitled proceeding. That the statement contained in Paragraph I of the contest herein to the effect that the said Joseph W. Cox has not made the required expenditure of One Dollar per acre per year since the date of entry towards the reclamation of said land, or any other time, and that he has made no expenditure toward the ultimate reclamation of said land is untrue in each

and every particular. That within one year after the making of said entry affiant purchased and had located upon said land for the purpose of procuring a water right for and obtaining water with which to irrigate said land eighty shares of stock in Imperial Water Company No. 5 for which he paid the sum of Twelve Hundred Dollars. That affiant made proof of such expenditure as and for his first, second and third annual proofs under his said entry before Major S. Cook, County Clerk of Imperial County, and caused the same to be filed in the United States Land Office at Los Angeles, California, during the year 1913, and at which time said land was situate within the Los Angeles Land District. That such expenditure was necessary in order to obtain water for the irrigation of said land.

That it is not true that the entry of affiant was invalid or that it was erroneously or improperly allowed or that Ethel Hart was in possession or engaged in the reclamation of said land at the time that affiant first asserted claim thereto or at the time his said entry was initiated, or at the time his right to make such entry was acquired.

That it is true that she was in possession thereof at the time said entry was allowed, but that her possession was illegal and has heretofore been decided to be illegal by the Secretary of the Interior after and upon a hearing authorized and held by the Department of the Interior to determine the respective rights of the said Ethel Hart and affiant.

That it is not true that the said Ethel Hart was the first to take possession of said land or commence

reclamation thereof, neither is it true that she was engaged in the work of [155] reclamation when affiant first attempted to take possession and make entry thereof.

That it is not true that the said Ethel Hart went upon said land and took actual possession thereof about February 1st, 1906, or at any other time, prior to the year 1909, at which time affiant was in the actual possession thereof and engaged in the work of reclamation of said land.

That it is not true that the said Ethel Hart continued in the actual possession of said land until the 8th day of November, 1906, that said Ethel Hart was not in possession of said land on the 8th day of November, 1906, and had never been in possession of said land prior thereto or at any time prior to 1909.

That it is true that on the 8th day of November, 1906, affiant took possession of said land and continued in possession thereof until February, 1909, but that it is not true that possession was taken either clandestinely, forcibly or unlawfully, but the facts are that no one was in possession of the land at the time, and the same was public land open to settlement, and affiant openly made settlement thereof and commenced the reclamation thereof. That after such entry and between the 8th day of November, 1906, and February, 1909, affiant built a ditch on the east side of said land running north and south and which ditch is now being used to irrigate the said land and also leveled and bordered about fifty acres of said land and had the said land ready to be irrigated when in February, 1909, he was unlawfully dispossessed of

said land by the said Ethel Hart under and by virtue of a Writ of Possession issued out of the Superior Court of Imperial County, California, in an action wherein said Ethel Hart was plaintiff and affiant was defendant. That in so building said ditch and leveling and bordering said land affiant expended more than the sum of Five Hundred Dollars. That the said Ethel Hart has not personally made any expenditure toward the reclamation of said land or reclaimed or cultivated any of said land, but that such work has been done by her father, for whom she is a mere dummy. That she has not reclaimed the same so as to entitle her to make entry or final proof or receive patent for said land, but that she has remained in possession of said land in defiance of the final decision of the Department of the Interior and has prevented affiant from continuing his work of reclamation so begun. That after affiant was so ousted from the possession of said land J. W. Hart, the father of said Ethel Hart, in the name of and pretending to act for his said daughter Ethel Hart, the contestant herein, took possession of said land and of the work so done by affiant and put water on said land and put all thereof in cultivation, and has since cultivated the same and deprived affiant of the rents, issues and profits of said land, which have amounted to more than Eight Dollars per acre per annum.

That it is not true that the entry of the said affiant is invalid for the reason alleged in said contest, or for any other reason, and that it is not true that he has done no act to entitled him to make entry of final proof of said land or receive patent thereto, but on

the contrary affiant by the building of said ditch and the purchase of the said water stock brought the water to said land in sufficient quantities to entirely irrigate the same, and all thereof, and the only reason that affiant has not actually cropped the said land is that he has been prevented from so doing by the contestant who now claims the benefit of her illegal action and her defiance of the Department of the Interior. [156]

That it is not true that affiant has abandoned the said land in any way nor is it true that he has exercised no active ownership with respect thereto since his said entry, but, on the contrary, since making said entry affiant purchased the water stock hereinabove mentioned, and caused said stock to be located upon the said land and made his annual proofs of expenditures as required by the desert land law showing that such purchase was made for the benefit of said land and for its ultimate reclamation.

That it is not true that affiant's entry was not made in good faith or that he is holding the same for speculative purposes, but that as a matter of fact affiant is holding the same purely for the purpose of making a home for himself thereon.

Contestant Ethel Hart is not a farmer, is not physically able to farm, and has no funds wherewith to reclaim land except such as is furnished by her father J. W. Hart for whose benefit she has been claiming this land and defying the final decision of the Department of the Interior.

That it is not true that the said Ethel Hart is en-

titled to make entry of said land either for the reason alleged, or for any reason.

Affiant further says that the entire matter sought to be adjudicated in the application to contest herein has been heretofore fully heard, investigated and decided by the Department of the Interior and decided in favor of affiant, all of which will more fully appear in the records of the Department of the Interior and the decision of the Honorable Secretary of the Interior.

WHEREFORE, affiant prays that said contest be dismissed and his final proof approved.

JOSEPH W. COX.

P. O. Address, Brawley, Cal.

Subscribed and sworn to before me this 6th day of December, 1916.

F. C. FARR,
Register, U. S. Land Office. [157]

It was stipulated that after defendant Cox received his certificate of the desert land entry of the land in question, he demanded possession of Ethel Hart, but possession was refused.

Testimony of Fred O. Hartman, for Defendant.

FRED O. HARTMAN, called as a witness for the defendant, testified:

That he was a farmer and was in the Imperial Valley during 1906 and 1907. That he did some of the work for Cox while Cox was in possession of the land in controversy. That he built a ditch nearly half a mile long sufficient to irrigate the entire quarter-section, and that the borders which were erected were

in first-class shape and the work done on the land in the manner generally done. At that time nothing remained to be done in order to proceed with cultivation of that fifty or sixty acres except for the Water Company to complete its ditch and connect it with Mr. Cox's. At that time the Company's ditch was not completed.

It was here stipulated that the township survey made of the land in question, in 1903, was actually approved by the Department in 1904, and that it was the survey that established the exterior boundary lines of the townships of the resurvey.

The defendant then put in evidence the decision of the Honorable Assistant Secretary of the Interior dated December 17th, 1917, finally rejecting the contest of the plaintiff against the entry of the defendant, the same being in the words and figures following, to wit: [158]

(Copy)

DEPARTMENT OF THE INTERIOR,
WASHINGTON.

D—34908. November 7, 1917.

"H"

El Centro—02759.

Contest affidavit rejected in part.

Modified.

ETHEL HART

vs.

JOSEPH W. COX.

APPEAL FROM THE GENERAL LAND OFFICE.

By decision of August 5, 1913 (42 L. D. 592), the

Department reversed the decision of the Commissioner of the General Land Office, dated December 7, 1912, and directed that Joseph W. Cox should be allowed to make desert land entry for tract 113, of Sec. 8, T. 14 S., 15 E, S. B. M., California (160 acres), and that the application of Ethel Hart should be rejected as to the land in conflict. A petition for the exercise of supervisory authority was later denied (42 L. D. 595).

Cox's application was allowed March 4, 1914, and on November 28, 1916, he submitted final proof. It is alleged therein that 150 acres of the land is in cultivation, being irrigated by the system of Imperial Water Company No. 5, Cox being the owner of 150 shares of the capital stock of said company, and that he had spent $3,500 in complying with the legal requirements. Final certificate was withheld because an application to contest had been filed on the day preceding by said Hart, charging—

That said Joseph W. Cox has not made the required expenditure of $1.00 an acre each year since date of entry, towar*es* the reclamation of said land, or at any time; and that he has made no expenditure whatever towards the ultimate reclamation of said land;

That the foregoing described entry of Joseph W. Cox is invalid in that it was erroneously and improperly allowed, the contestant, Ethel Hart, having been in possession and engaged in the reclamation of said land and being qualified to make entry thereof, at the time said Joseph W. Cox first asserted claim thereto, and at the time his said entry was initiated

and at the time it was allowed; that the said Ethel Hart was the first to take possession of said land and commence the reclamation thereof, and was engaged in the work of reclamation of said land when the said Joseph W. Cox first attempted to take possession and make entry thereof;

That the said Ethel Hart, being at all times herein mentioned, and now, qualified to make entry under the desert land laws of the United States, went upon said land and took actual possession thereof about February 1, 1906, with the intent and purpose to reclaim the same under the provisions of the desert land laws, and that she commenced the work of reclamation thereof; that thereafter and until on or about the 8th day of November, 1906, she continued in the actual possession of said land, and on said last-mentioned date the aforesaid Joseph W. Cox clandestinely, forcibly and unlawfully took possession of said land and [159] continued in possession thereof until February, 1909, when said Joseph W. Cox was dispossessed by a writ of possession issued out the Superior Court of the County of Imperial, State of California, in an action wherein said Ethel Hart was plaintiff and said Joseph W. Cox was defendant, which said action was one in ejectment brought to recover possession of said land; and a judgment was rendered and entered in said action by said Superior Court on February 10, 1909, in favor of the plaintiff Ethel Hart, and against the defendant therein, Joseph W. Cox, that said Ethel Hart do have and recover of and from said Joseph W. Cox possession of the premises herein referred to, and

which judgment was thereafter on the 22d day of November, 1915, affirmed by the Supreme Court of the State of California (171 Cal. 364); that ever since February, 1909, said Ethel Hart has remained and still is in actual and exclusive possession of all of said land and has never abandoned the same; that she has made more than the expenditure of $3,00 per acre required by law towards the reclamation of said land; that she has acquired a water right for the reclamation of said land; that she has reclaimed and cultivated to crops the entire area of said land for more than seven years preceding the date of this contest; that she has paid all state, county, and other taxes on said land for eight years preceding the date of this contest; and that she is now in the undisturbed possession of said land and has fully reclaimed the same so as to entitle her to make entry and final proof of, and to receive patent to, said land;

That the said entry of said Joseph W. Cox is invalid for the further reason that said Joseph W. Cox has done no act to entitled him to make an entry and final proof of said land and to receive patent thereto; that he has never performed any work or made any expenditures towards the ultimate reclamation of said land; that he has not been in possession of said land, or any part thereof, since February, 1909; that he has never irrigated or cultivated said land; and that he has done nothing whatever upon said land towards its reclamation, cultivation or improvement since date of entry, and has wholly abandoned said land and has exercised no act of ownership with respect thereto since date of entry;

That the said entry of Joseph W. Cox was not made in good faith, as shown in the foregoing allegations, but that he is merely holding his claim thereto for speculative purposes, in case he should succeed in clearing the record of other claims;

That the said Ethel Hart is entitled to make entry of said land by reason of her prior and better right thereto, and by reason of the lack of good faith, right, possession and reclamation of said Cox."

After service of notice of the contest Cox filed answer alleging that the entire matter sought to be adjudicated has been heretofore fully heard, investigated and decided by the Department in his favor, and moving that the contest be dismissed. The local officers sustained the motion and on appeal the Commissioner of the General Land Office by the decision of August 9, 1917, held that all matters set forth in the contest affidavit have been fully litigated except the charge of failure to make the required expenditures and remanded the case for trial upon that charge alone. Hart has appealed.

If the application to contest involved simply a charge of failure to comply with the law, the contestant would be allowed to proceed as a matter of right; but the entire proceeding is apparently an attempt to relitigate a closed case in which over 300 pages of testimony were submitted and voluminous [160] briefs and arguments of counsel were considered. Contestant merely sets forth a condition which she brought about by a decree of Court, and is estopped from charging entryman with default merely because he obeyed the decree of the Court.

For that reason the decision appealed from is modified and the application to contest denied.

If the Commissioner of the General Land Office is not satisfied that sufficient expenditures have been made by Cox he will cause the entry to be investigated by a special agent.

(Signed) ALEXANDER T. VOGELSANG,
First Assistant Secretary. [161]

Defendant then offered in evidence an affidavit filed by Cox in connection with his application, made on March 1st, 1909, and filed with his said application, the same being in words and figures following, to wit:

State of California,
County of Imperial.—ss.

Joseph W. Cox, being duly sworn, says, that he is the same Joseph W. Cox who heretofore on the 17th day of July, 1907, filed in the United States Land Office of Los Angeles, application to make Desert Land Entry, the land described in his said entry, being described by metes and bounds.

That the land described in affiant's said application by metes and bounds is the same land as that described in the accompanying application, according to its tract number under the new survey, and that affiant's application tendered herewith is amendatory of his application heretofore filed in which the said land is described by metes and bounds.

JOSEPH W. COX.

Subscribed and sworn to before me this 27th day of Feby., 1909.

DANIEL S. ELDER,
County Clerk and Ex-officio Clerk of Superior Court of the County of Imperial, State of California.

The foregoing contains the substance of all of the evidence introduced on the trial of said cause.

The above statement is correct and may be settled.

M. W. CONKLING,
Atty. for Defendant.

HUNSAKER, BRITT & EDWARDS, and
GEORGE H. P. SHAW,
Attys. for Complainant.

The foregoing statement is hereby settled and allowed.

OSCAR A. TRIPPET,
Judge. [162]

[Endorsed]: Hart vs. Cox. Engrossed Statement of Evidence. Filed May 24, 1920. Chas. N. Williams, Clerk. R. S. Zimmerman, Deputy. [163]

In the United States District Court, Southern District of California.

IN EQUITY.

ETHEL HART,
Complainant,

vs.

J. W. COX,
Defendant.

Petition for Appeal.

To the Hon. OSCAR A. TRIPPET, District Judge:

The above-named defendant feeling aggrieved by the decree rendered and entered in the above-entitled cause on the 3d day of February, 1920, does hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit for the reasons set forth in the assignment of errors filed herewith, and he prays that his appeal be allowed and that citation be issued as provided by law, and that a transcript of the record proceedings and document upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit under the rules in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of him be made.

M. W. CONKLING,
Solicitor for Complainant.

Appeal allowed upon giving bond as required by law in the sum of $300.00.

TRIPPET,
Judge. [164]

[Endorsed]: D. 110. In the United States District Court, Southern District of California. In Equity. Ethel Hart, Complainant, vs. J. W. Cox, Defendant. Petition for Appeal. Filed Apr. 5, 1920. Chas. N. Williams, Clerk. By Ernest J. Morgan, Deputy Clerk. [165]

In the United States District Court, Southern District of California.

IN EQUITY—No. D. 110.

ETHEL HART,

Complainant,

vs.

J. W. COX,

Defendant.

Assignment of Errors.

Comes now the defendant in the above-entitled case and files the following assignment of errors upon which he will rely upon the prosecution of the appeal in the above-entitled cause, from the decree made by this Honorable Court on the 3d day of February, 1920.

I.

That the United States District Court, Southern District of California, erred in awarding judgment to the plaintiff, and in not directing and causing to be entered a judgment dismissing the said bill of complaint.

II.

That the said Court erred in holding that the lands in question occupied the status of unsurveyed lands since March 31st, 1906, it duly appearing from the undisputed evidence that the said lands were surveyed, and survey thereof approved by and under the authority of the Department on or about the year 1857, and that fact being admitted in the pleadings herein. [166]

III.

That the said Court erred in holding that the lands were unsurveyed land, and it being admitted in the plaintiff's bill of complaint that they had been prior thereto surveyed and such fact being admitted upon the hearing before the land department and before this Court. Said Court erred in holding that the Act of March 28th, 1908, applied to this controversy, it being apparent from the said act itself that it only applied to lands which had never been surveyed, and in this that it was shown by the uncontroverted evidence and admissions of the parties that the defendant Cox made a proper and valid application for the lands in question, on July 17th, 1907, which said application should have been by the local land office, and by the Department of the Interior recognized and allowed, and which said application must, in equity, be deemed to have been allowed at the time when it was presented.

IV.

The said Court also erred in holding that there was any merit in the claim of the plaintiff that she was prior in time as to application for the land in controversy, it appearing from the admissions and uncontroverted evidence introduced that she never made any application for the land in controversy until May 15th, 1909, and long after Cox had made out and filed proper application therefor. The said Court erred in not ordering and causing to be entered judgment in favor of the plaintiff herein in this that it appeared from the admissions and uncontroverted evidence that the land in question was

open to desert land entry on July 17, 1907, at which time the said defendant made out and filed proper application therefor, and which application should have been [167] allowed, and which application must in equity be deemed to have been allowed at that time, and the said Cox has since complied with the law in all respects, and has made final proof and final payment for the said land, and has received patent of the United States therefor, and also in this that it appears from the uncontroverted evidence and the admissions of the parties herein that the said land was desert land, open to entry under the desert land act on March 1st, 1909, and that on that date the said Joseph W. Cox, filed proper application to make desert land entry of said land. That he was the first person to make desert land application for said land, and that no other person had, or had acquired, any right to make entry of said land, superior to said Cox, and that he was the first person to make such application, and that his application was duly allowed by the Department of the Interior, and that he thereafter complied with the law, and made due final proof and payment therefor, and duly received patent of the United States therefor.

V.

The said Court erred in holding that the Act of March 28, 1908, had any application to this controversy, it being shown that complainant did not take possession of the tract in controversy or any part thereof prior to survey thereof.

VI.

The Court erred in holding that the Act of March

28, 1908, had any retroactive effect, it being apparent from its terms and from the general legislation on the subject as well as from the ordinary rules of statutory construction that the said act was intended to operate prospectively only.

WHEREFORE, appellant prays that said decree be reversed, and the said District Court for the Southern District of California, Southern Division, be ordered to enter a decree reversing the decision of said Court in said case, and for his costs.

M. W. CONKLING,
Solicitor for Appellant. [168]

[Endorsed]: In Equity—D. 110. In the United States District Court, Southern District of California. Ethel Hart, Complainant, vs. J. W. Cox, Defendant. Assignment of Errors. Filed Apr. 5, 1920. Chas. N. Williams, Clerk. By Ernest J. Morgan, Deputy Clerk. [169]

In the United States District Court, Southern District of California, Southern Division.

ETHEL HART,

Complainant,

vs.

JOSEPH W. COX,

Defendant.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, that we, Joseph W. Cox, as principal, and Henry L. Jackson and Sidney D. Ulrey, as sureties, are

held and firmly bound unto Ethel Hart in the sum of Three Hundred Dollars, lawful money of the United States, to be paid to her and her executors, administrators and successors; to which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and each of our heirs, executors and administrators, by these presents.

Sealed with our seals and dated this 9th day of April, 1920.

Whereas, the above-named defendant Joseph W. Cox has appealed from a judgment rendered against him in the above-entitled cause, to the Circuit Court of Appeals of the United States, for the Ninth Circuit, to secure a reversal of the said judgment in the said cause.

NOW, THEREFORE, the condition of this obligation is such that if the above-named Joseph W. Cox shall prosecute [170] his said appeal to effect and answer all costs if he fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

JOSEPH W. COX.
HENRY L. JACKSON.
SIDNEY D. ULREY.

State of California,
County of Imperial,—ss.

On this 10th day of April, 1920, personally appeared before me Henry L. Jackson and Sidney D. Ulrey, respectively known to me to be the persons described in and who duly executed the foregoing instrument as parties thereto, and respectively ac-

knowledged, each for himself that they executed the same as their free act and deed for the purposes there set forth.

And the said Henry L. Jackson and Sidney D. Ulrey, being respectively by me duly sworn, says each for himself and not one for the other, that he is a resident and householder of the said county of Imperial, and that he is worth the said sum of Three Hundred Dollars, over and above his just debts and legal liabilities, in property exempt from execution.

HENRY L. JACKSON.
SIDNEY D. ULREY.

Subscribed and sworn to before me this 10th day of April, 1920.

[Seal] E. A. DE BLOIS,
Notary Public in and for the County of Imperial, State of California. [171]

[Endorsed]: In Equity—D. 110. In the United States District Court, Southern District of California, Southern Division. Ethel Hart, Complainant, vs. Joseph W. Cox, Defendant. Bond on Appeal. Filed Apr. 16, 1920. Chas. N. Williams, Clerk. By R. S. Zimmerman, Deputy Clerk.

The within bond is approved this April 16, 1920.

ERSKINE M. ROSS,
Circuit Judge.

The sureties on the within bond are good and sufficient.

M. W. CONKLING,
Solicitor. [172]

UNITED STATES OF AMERICA.

District Court of the United States, Southern District of California.

No. D–110.

ETHEL HART,

Complainant,

vs.

J. W. COX,

Defendant.

Praecipe for Transcript of Record.

To the Clerk of said Court:

Please prepare and certify the record on appeal in the above-entitled cause and include therein the bill of complaint, the answer thereto, the opinion of the Court, the judgment, petition for appeal, assignments of error, order allowing appeal, and the bond on appeal in said cause, together with all the endorsements upon each of said documents, and also all the evidence in said cause.

With respect to the evidence in said cause, you will of course follow Equity Rule No. 75, there being this day deposited with you a statement of said evidence.

Respectfully,
M. W. CONKLING,
Solicitor for Defendant.

[Endorsed]: D. 110. United States of America, District Court of the United States, Southern District of California. Ethel Hart, Complainant, vs. J. W. Cox, Defendant. Praecipe. Recd. copy

April 16, 1920. Hunsaker, Britt & Edwards, G. H. P. Shaw, Solicitors for Complainant. Filed Apr. 13, 1920. Chas. N. Williams, Clerk. By R. S. Zimmerman, Deputy Clerk. [173]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. D. 110—EQUITY.

ETHEL HART,

Complainant,

vs.

J. W. COX,

Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Chas. N. Williams, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing one hundred seventy-three (173) typewritten pages, numbered from 1 to 173, inclusive, to be a full, true and correct copy of the bill of complaint, amendment to bill of complaint, answer, final decree, conclusions of the Court, statement of evidence, petition for appeal and allowance thereof, assignment of error, bond on appeal, and praecipe for record in the above and therein entitled cause, and that the same together constitute the transcript on appeal in said cause in accordance

with the praecipe of the defendant filed in my office by the solicitor of record.

I DO FURTHER CERTIFY, that the cost of the foregoing transcript on appeal is $63.45, the amount whereof has been paid me by said appellant.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court of the United States of America, in and for the Southern District of California, Southern Division, this 21st day of July, in the year of our Lord one thousand nine hundred and twenty, and of our Independence the one hundred and forty-fifth.

[Seal] CHAS. N. WILLIAMS,
Clerk of the District Court of the United States of America, in and for the Southern District of California. [174]

[Endorsed]: No. 3526. United States Circuit Court of Appeals for the Ninth Circuit. Joseph W. Cox, Appellant, vs. Ethel Hart, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed July 23, 1920.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States District Court, for the Southern District of California, Southern Division.

IN EQUITY—D. 110.

ETHEL HART,

Complainant,

vs.

J. W. COX,

Defendant.

Order Enlarging Time to and Including June 1, 1920, to File Record and Docket Cause.

In the above-entitled cause appeal by the defendant having been heretofore allowed, and good cause appearing,—

IT IS ORDERED that the time for filing record on appeal in said cause with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit and docketing the said cause therein, be and the same is hereby extended until June 1, 1920.

ERSKINE M. ROSS,
Circuit Judge.

[Endorsed]: No. 3526. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including May 1, 1920, to File Record and Docket Cause. Filed May 13, 1920. F. D. Monckton, Clerk. Re-filed July 23, 1920. F. D. Monckton, Clerk.

UNITED STATES OF AMERICA.

Circuit Court of Appeals, Ninth Circuit.

ETHEL HART,

Complainant and Respondent,

vs.

J. W. COX,

Defendant and Appellant.

Stipulation and Order Extending Time to and Including July 10, 1920, to File Record.

It is hereby stipulated that the appellant may have until and including July 10th, 1920, in which to cause record on appeal to be filed in the above-entitled action.

GEO. H. P. SHAW,
HUNSAKER, BRITT & COSGROVE,
Attorneys for Respondent.

It is so ordered.

ROSS,
Circuit Judge.

Order Extending Time to and Including July 25, 1920, to File Record and Docket Cause.

Good cause appearing therefor, the time to file the record and docket the cause in the above-entitled cause is hereby extended to and including July 25th, 1920.

July 10th, 1920.

ROSS,
Circuit Judge.

[Endorsed]: No. 3526. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including July 25, 1920, to File Record and Docket Cause. Filed July 12, 1920. F. D. Monckton, Clerk. Re-filed July 23, 1920. F. D. Monckton, Clerk.

[Endorsed:] Printed Transcript of Record. Filed September 3, 1920. F. D. Monckton, clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3526.

JOSEPH W. COX, Appellant,

vs.

ETHEL HART, Appellee.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT OF APPEALS FOR THE NINTH CIRCUIT.

At a Stated Term, to wit, the October Term, A. D. 1920, of the United States Circuit Court of Appeals for the Ninth Circuit, Held in the Court-room Thereof, in the City and County of San Francisco, in the State of California, on Monday, the Fourth Day of October, in the Year of Our Lord One Thousand Nine Hundred and Twenty.

Present:

Honorable William B. Gilbert, Senior Circuit Judge, Presiding.
Honorable Erskine M. Ross, Circuit Judge.
Honorable William W. Morrow, Circuit Judge.

No. 3526.

JOSEPH W. COX, Appellant,

vs.

ETHEL HART, Appellee.

Order of Submission.

Pursuant to stipulation of counsel for the respective parties filed September 30, 1920, and good cause therefor appearing, Ordered above entitled cause submitted to the Court for consideration and decision on briefs, with leave to counsel for the appellee to file brief within thirty days from date, and with leave to counsel for the appellant to reply thereto thirty days thereafter.

At a Stated Term, to wit, the October Term, A. D. 1920, of the United States Circuit Court of Appeals for the Ninth Circuit, Held in the Court-room Thereof, in the City and County of San Francisco, in the State of California, on Monday, the Third Day of January, in the Year of our Lord One Thousand Nine Hundred and Twenty-one.

Present:

Honorable William H. Hunt, Circuit Judge, Presiding.
Honorable Maurice T. Dooling, District Judge.

No. 3526.

JOSEPH W. COX, Appellant,

vs.

ETHEL HART, Appellee.

Order Directing Filing of Opinion and Filing and Recording of Decree.

By direction of the Honorable William B. Gilbert, Erskine M. Ross, and William W. Morrow, Circuit Judges, before whom the cause was heard, Ordered that the typewritten opinion this day rendered by this Court in the above entitled cause be forthwith filed by the Clerk, and that a Decree be filed and recorded in the Minutes of this Court, in accordance with said opinion.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3526.

JOSEPH W. COX, Appellant,

vs.

ETHEL HART, Appellee.

Before Gilbert, Ross, and Morrow, Circuit Judges.

(*Opinion U. S. Circuit Court of Appeals.*)

Appeal is taken from a decree whereby it was adjudged that the appellant herein held title in trust for the appellee to 160 acres of land. The land is situated in the Imperial Valley, in San Diego County, California, the lands whereof were originally surveyed in 1856. Settlement did not begin until nearly half a century later. It was then found that the marks of the survey had so far been obliterated that it was practically impossible to locate the lines thereof. On July 1, 1902, Congress passed an act providing for the re-survey of lands in the Imperial Valley, but that survey was not completed until February, 1909. In the meantime entries upon the land under the public land laws were permitted. In February, 1906, the appellee caused a furrow to be plowed around 320 acres, the west 160 acres of which is the land in controversy in the present suit. She posted notices of her claim. In 1906 she raised a crop on 80 acres of the east half of her claim, and sowed grain on four or five acres of the west half. On that half she plowed furrows for a ditch, and in November, 1906 set stakes for marking out a head ditch along the east line of the land in controversy, and marked out lines for borders thereof and plowed furrows for a ditch on the south line thereof. On November 8, 1906, the appellant

moved a tent house onto the northeast corner of the tract in controversy, and laid claim to that 160 acres. He saw the furrows which had been plowed on that land, and he was notified of the appellee's claim thereto. He lived on the land until March, 1909, when he was ejected therefrom as the result of a suit brought by the appellee in the state court. In July, 1907, the appellant made application for the land in controversy, describing it by metes and bounds. His application was rejected, on account of defective description. 13 days later the appellee made an application for the 320 acres which she claimed, and her application was likewise rejected. After the completion of the resurvey, the appellant on March 1, 1909, renewed his application, and on May 15, 1909, the appellee renewed her application, both applications describing the lands in the terms of the re-survey. On a hearing in the local land office decision was rendered in favor of the appellant, and upon appeal to the Commissioner of the General Land Office the decision was reversed, but upon appeal to the Secretary, the final decision was in favor of the appellant. The court below, upon the pleadings and proof, reached the conclusion that the Commissioner of the General Land Office was correct in his conclusion, and entered a decree for the appellee.

GILBERT, *Circuit Judge*, after stating the case:

Decision of the controversy on the merits, both in the Land Office and in the court below, turned on the question whether or not the appellee was entitled to the preference right conferred by the Act of Congress of March 28, 1908, which provides that entries under the Desert Land Acts "shall be restricted to surveyed public lands of the character contemplated by said Acts, and no entries of unsurveyed lands shall be allowed or made of record. Provided, however, that any individual qualified to make entry of desert lands under said Acts, who has prior to survey taken possession of the tract of unsurveyed desert land, not exceeding in area 320 acres in compact form, and has reclaimed, or has in good faith commenced the work of reclaiming the same, shall have the reference right to make entry of such tract under said Acts, in conformity with the public land surveys, within ninety days after the filing of the approved plat of survey in the District Land Office." In the proceedings in the Land Office it was found that the appellee was prior in possession and had in good faith commenced the work of reclaiming the land in controversy, but her preference right to make entry was finally denied by the Assistant Secretary on the ground that the lands were not unsurveyed lands, but were in fact surveyed lands under the survey of 1856, and that the Act of March 28, 1908, had no application whatever thereto, and that the appellant was first in right by reason of being the first to file proper application pending the resurvey, and the first to file application after the filing of the resurvey plat.

The appellant contends that the appellee was not a settler on the land in controversy and that the acts which she performed thereon

gave her no right thereto at the time when he made his residence thereon and filed his first application and that the filing of that application on July 17, 1907, was the first act of any one to create a right to the land. But the land was not then vacant and unoccupied. In the Land Department it was found that the appellee in 1906 in good faith commenced the work of reclaiming the land in dispute before the entrance of the appellant thereon. In the case of Hart v. Cox, 171 Cal. 364, it was adjudged that the appellee's acts in posting notice, running furrows around the entire tract, cultivating tracts both upon the east half and the west half of her claim, constructing ditches, instituting irrigation, setting stakes and in laying out lines for future irrigation, were sufficient to prove possessio pedis upon the whole tract whereupon to maintain ejectment, and the court held, in view of those facts that it was unnecessary that she should have placed improvements upon every acre of the tract, that she had entered upon the land and was adopting the usual means of improving it. The Desert Land Acts (19 Stat. 377, 26 Stat. 109) do not require residence on the land. The principal requirements are that the claimant shall file a plat showing the mode of contemplated irrigation and shall expend a prescribed amount per acre in making permanent provision for such irrigation, and in addition thereto shall cultivate one-eighth of the land. In the case of Virgil Patterson, 40 L. D. 264, it was held that the possession and improvement contemplated by the Act of March 28, 1908, "are not such as are required of a settled under the homestead law, but it is sufficient under that Act if the possession and improvement conform to the requirements of the Desert Land Law and evidence the party's good faith under that law."

We are of the opinion that the court below properly held that at the time when the claims of the parties hereto were initiated the land was unsurveyed land, and that the Act of March 28, 1908, was applicable thereto and conferred a preference right upon the appellee. The Act of 1902 authorizing a resurvey was a legislative declaration that the lands were to be regarded as unsurveyed lands, that a new survey was to be substituted for the old, and that by the new survey the future disposition of the lands was to be regulated. By a proviso in that Act protection was afforded as to then existing claims of occupants. The inference follows that as to all whose rights were initiated thereafter, the resurvey was intended to be controlling. This was the construction placed upon the Act by the Land Department. By an order of the Commissioner of the Land Office of March 31, 1906, all entries in Imperial Valley were suspended after that date. About a year later the Commissioner directed that the order of suspension of said lands from entry be modified so as to permit "the desert land entry thereof the same as though the lands were unsurveyed." In Nichols v. McCullom, 169 Cal. 611-14, the court said: "The public lands are under the exclusive control of Congress until title, or a right to acquire title has, pursuant to some law, vested in some person or body corporate other than the United States. A person who claims no right in such public lands certainly cannot

object to the Act of Congress in abandoning a survey already made and substituting another in its place."

The decree is affirmed.

[Endorsed:] Opinion. Filed January 3, 1921, F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3526.

JOSEPH W. COX, Appellant,

vs.

ETHEL HART, Appellee.

Decree.

Appeal from the District Court of the United States for the Southern District of California, Southern Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Southern District of California, Southern Division and was duly submitted:

On Consideration Whereof, It is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the appellee and against the appellant.

It is further ordered, adjudged and decreed by this Court, that the appellee recover against the appellant for her costs herein expended, and have execution therefor.

[Endorsed:] Decree. Filed and Entered January 3, 1921, F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

3526.

JOSEPH W. COX, Appellant,

vs.

ETHEL HART, Appellee.

Petition for Rehearing.

C. L. Brown, Solicitor for Appellant.

Filed Jan. 26, 1921.
F. D. MONCKTON,
Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

JOSEPH W. COX, Appellant,

vs.

ETHEL HART, Appellee.

Petition for Rehearing.

The appellant asks a rehearing of this cause for the reasons herein set forth:

I will assume the correctness of the court's decision herein as to all matters which the court appears from its opinion to have definitely considered and passed its opinion upon. However, it appears to me that the court has overlooked or at least not given the consideration deserved to the application for the land made by appellant Cox in July, 1907. The land at that time, according to the court's decision herein, was unsurveyed land. The desert land law provided that unsurveyed land could be entered, and in application therefor should be described by metes and bounds. Cox's application so described the land. While his application was at the time rejected by the inferior officers of the land department, the secretary has decided that his applic-tion was in all respects in correct form and should have been allowed at the date presented; at that date the land was open to entry. The effect, therefore, was the same as though the department had on that date allowed his entry. If they had not reconsidered their decision and had patented the land to some other person Cox could have maintained a suit in equity like the one at bar, himself, to control the legal title and compel conveyance to himself. His application being correct and for land open to entry, he could not lose the land by reason of the failure of the officers of the land department to do their duty.

Lyttle v. Arkansas, 9 Howard 333;
Cunningham v. Ashley, 55 U. S. 277;
Ard v. Brandon, 156 U. S. 543;
Bannifer v. Smith, 166 Fed. 849.

When after the secretary finally decided that this application of July, 1907, was correct and should have been allowed and issued patent to Cox, that patent related back to the date of Cox's original application.

Weeks v. Bridgman, 159 U. S. 542;
Sturr v. Beck, 133 U. S. 541;
Shepley v. Cowan, 91 U. S. 330;
Pater v. Desmond, 129 Fed. 1.

Upon the strength of these decisions Secretary Lamar (afterwards Justice of Supreme Court) held that the improper rejection of an application did not prejudice such application and that where upon subsequent consideration it was determined that it should

have been allowed, it should then be allowed as of the date when originally presented.

Pfaffer v. Williams, 4 L. D. 455.

The rights of Cox, therefore, dated from July 17, 1907, and arise not by reason of his settlement on the land but solely by reason of his having on that date tendered a valid application.

This application constituted an acceptance of the government's offer to sell the land and constituted a contract between the government and the applicant.

McConnaughy v. Pennoyer, 43 Fed. 201;
State v. Billings, 60 Pac. 61.

The land was not thereafter subject to disposal, even by Congress itself.

Kansas Pac. v. Dunnemeyer, 113 U. S. 629.

It follows, I think, that if this land was open for entry on July 17, 1907, appellant's application for the same took the land and it was not thereafter subject to congressional disposal.

The only claim on the part of respondent which is urged seriously as against this entry by Cox on July 17, 1907, is that the land was not then subject to desert land entry because of the occupancy of appellee Hart.

Assuming as determined by this court the fact of such occupancy, I fail to find in the decision of this court any language from which it may be inferred that this court has been able to find any statute or decision which states that occupied land is not subject to entry under the desert land law, or that such matter has been by this court considered.

I confidently assert that there is neither such statute nor decision. Such decisions as exist are without a single exception the other way, and hold that occupancy does not prevent the land department from legally allowing an entry of land at the land office. Of course, there are some forms of entry of public lands which by the express language of the statute are restricted to unoccupied land. Such was the case with the scrip law construed by this court in Cosmos Explor. Co. v. Gray Eagle Oil Co., 104 Fed. 20. The public land statutes are in pari materia and must be so construed. Now, in some of these statutes in defining what land may be entered under particular statutes it is expressly stated that the land to be entered shall be only land of a certain character. In nearly every public land statute the character of the land which can be entered under such statute is minutely described. For instance, in the statute before His Honor Judge Ross, in

Cosmos Exploration Co. v. Gray Eagle Oil Co., supra,

the statute prescribed that only vacant land open to settlement could be entered. And in Donley v. Van Horn, 33 Cal. App. Dec. 222, the California Court of Appeals construed a similar statute (38 Stat.

372), and held that because the statute expressly inhibited the entry of occupied land the patent allowed the entryman was absolutely void. That decision is based on the decision of this court above cited and other cases, and in this case if the laws of the United States prohibited the entry of occupied land under the desert land law, then is the patent to appellant not voidable but void, and no such action as that here at bar lies to declare a trust in a void patent.

The statute involved herein known as the desert land law does not prohibit the entry of occupied land. Two contentions are put forward, however, why the court should hold that entries of occupied land are not permitted under the desert land law:

1. That the general policy of the law and the construction heretofore put upon it by the courts prohibit the entry of occupied land under any law.

2. That the nature of the acts required to be done under the desert land law impliedly prohibit the entry of occupied land.

With respect to the first contention the statute negatives the idea by providing in so many words that occupied land may be entered under certain laws notwithstanding the previous occupancy. For instance, sections 2264, 2265, 2272 and 2273 provide as follows:

Section 2264. When any person settles or improves a tract of land subject at the time of settlement to private entry, and intends to purchase the same under the preceding provisions of this chapter, he shall, within thirty days after the date of such settlement, file with the register of the proper district a written statement, describing the land settled upon and declaring his intention to claim the same under the preemption laws; and he shall, moreover, within twelve months after the date of such settlement, make the proof, affidavit, and payment hereinbefore required. If he fails to file such written statement, or to make such affidavit, proof, and payment within the several periods named above, the tract of land so settled and improved shall be subject to the entry of any other purchaser.

Sec. 2265. Every claimant under the pre-emption law for land not yet proclaimed for sale is required to make known his claim in writing to the register of the proper land office within three months from the time of the settlement, giving the designation of the tract and the time of settlement; otherwise his claim shall be forfeited and the tract awarded to the next settler, in the order of time, on the same tract of land, who has given such notice and otherwise complied with the conditions of the law.

Sec. 2272. Nothing in the provisions of this chapter shall be construed to preclude any person, who may have filed a notice of intention to claim any tract of land by pre-emption, from the right allowed by law to others to purchase such tract by private entry after the expiration of the right of pre-emption.

Sec. 2273. When two or more persons settle on the same tract of land, the right of pre-emption shall be in him who made the first

settlement, provided such person conforms to the other provisions of the law; and all questions as to the right of pre-emption arising between different settlers shall be determined by the register and receiver of the district within which the land is situated; and appeals from the decision of district officers, in cases of contest for the right of pre-emption, shall be made to the commissioner of the general land office, whose decision shall be final, unless appeal therefrom be taken to the secretary of the interior.

On the other hand, section 2313 provides as to certain lands, only those unoccupied shall be subject to entry.

Section 2347 provides for the entry of coal lands when vacant.

The Valentine scrip law (17 Stat. 649) limits the land to be entered to unoccupied land and generally it will be found that all various scrip laws expressly forbid the entry under such laws of occupied land, while no such language is found in homestead, desert land, timber and stone, timber culture, or other general laws.

Sections 2290 and 2355 provide definitely what shall be stated in affidavit for entry, as does the timber and stone law, 20 St. 89, referred to in Williamson v. U. S., 207 U. S. 425, which case the court held that the applicant could not be obliged to make any affidavit in perfecting his entry not required expressly by the statute.

This idea that there is a general exclusion of all occupied land from selection or entry under all laws as a matter of supposed public policy is directly negatived not only by the statutes above quoted, which provide in so many words for entry of land already settled on by another, also has been negatived by every decision rendered by the department of the interior in fifty years. These decisions by such men as Justice Lamar, Vilas, and other eminent secretaries, standing without dissent in any court whatever, are entitled not only to great weight, but in view of congressional acquiescence for many years, must be deemed the law. We especially refer to the following decisions:

Mark v. Bray, 1 Dec. of Dept. Interior 423;
Selway v. Flynn, 6 Dec. Dept. Interior 560;
Walker v. Snyder, 4 Dec. Dept. Interior 541;
Burris v. Cantwell, 15 Dec. Dept. Interior 387;
Bell v. Ward, 4 Dec. Dept. Interior 140;
Lawless v. Anderson, 7 Copps Land Owner 68;
Hill's Leading Cases 57;
Molyneaux v. Young, 7 Copps Land Owner 107;
Powers v. Forbes, 7 Copps Land Owner 149;
Palmer v. Cleavinger, 2 Sec. of Dept. Int. 56;
Thomas v. Blair, 13 Sec. of Dept. Int. 207.

Again the Supreme Court has definitely held that where there are two statutes providing for disposal of land, one excepting occupied land and the other failing to make such exception, this indicates the intention of Congress to not except occupied land in the latter case.
Gonzales v. French, 164 U. S. 339.

The maxim Expressio unius est exclusio ulterior is thus directly held applicable to this desert land law.

2. The contention that the requirements of the desert land law as to reclamation impliedly require the land entered to be unoccupied land for the reason that those things could only be done if the land was occupied by a forcible intrusion is without merit.

The same reason exists in the case of homestead entries where the entryman is required to take up his residence on the land. Yet the department has as seen for years held that a homestead entry could be made of occupied land and Congress has in so many words provided that if a preferred first settler does not make entry within the limited days in which he is preferred the "next settler" may enter the land (2265 R. S.). The statute also provides that for any failure to comply with law another may contest an entry and if he wins his contest that he may make entry of the land. Now suppose the first entryman, when his entry is contested and he loses, declines to vacate the premises. Is the law to be set at naught and the sucessful contestant to lose his right unless he can first persuade the occupant to move. And how long can a mere occupant prevent the government from selling its land. If the statutes do thus prohibit the entry under any law of occupied land, then an occupant by continuing his occupancy can effectually and forever prevent the sale of government land.

The work which a desert land entryman or homestead entryman is required to do on the land is to be done not before but after the entry is made, and in this respect they differ from the pre-emption law, which required the settlement to be made before an entry could be made at the land office.

After an entry is made at the land office a contract with the government is thereby achieved which entitles the entryman to possession. If thereafter some occupant refuses to vacate in some states the law permits ejectment on the equitable title and when ejectment is not the proper remedy injunction will be allowed in equity.

Jackson v. Jackson, 19 Pac. 847.

Or the land will be patented regardless of the occupancy.

Jenkins v. Gibson, 3 La. Ann. 203.

The cases relied on by appellee, Atherton v. Fowler etc., are fully reviewed in the land department cases we have cited and also in

Bek v. Meagher, 104 U. S. 279,

in which last case the Supreme Court flatly holds that mere occupation does not always prevent acquiring of title by others.

Respectfully submitted,

C. L. BROWN,
Solicitor for Appellant.

At a Stated Term, to wit, the October Term, A. D. 1920, of the United States Circuit Court of Appeals for the Ninth Circuit, Held in the Court-room Thereof, in the City and County of San Francisco, in the State of California, on Monday, the Fourteenth Day of February, in the Year of Our Lord One Thousand Nine Hundred and Twenty-one.

Present:

Honorable William B. Gilbert, Senior Circuit Judge, Presiding.
Honorable Erskine M. Ross, Circuit Judge.
Honorable William H. Hunt, Circuit Judge.

No. 3526.

JOSEPH W. COX, Appellant,

vs.

ETHEL HART, Appellee.

Order Denying Petition for a Rehearing.

On consideration thereof, and by a direction of the Honorable William B. Gilbert, Erskine M. Ross, and William W. Morrow, Circuit Judges, before whom the case was heard, it is ordered that the Petition, filed January 26, 1921, on behalf of the appellant for a rehearing of the above-entitled cause be, and hereby is denied.

United States Circuit Court of Appeals for the Ninth Circuit.

JOSEPH W. COX, Appellant,

vs.

ETHEL HART, Appellee.

Petition for Appeal.

Order Allowing Appeal and Fixing Amount of Bond.

To the Hon. Judge of the U. S. Circuit
Court of Appeals for the Ninth Circuit:

The above named defendant and appellant feeling aggrieved by the decree rendered and entered in the above entitled cause, on the 3rd day of January, 1921, does hereby appeal from said decree to the Supreme Court of the United States for the reasons set forth in the assignment of errors filed herewith, and he prays that his appeal be allowed and that citation be issued as provided by law, and that a transcript of the record proceedings and documents upon which said decree was based, duly authenticated, be sent to the Supreme Court of the United States, under the rules in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of him be made.

(Sgd.) C. L. BROWN,
Solicitor for Appellant.

Dated San Francisco, Cal., March 23, 1921.

Appeal allowed upon giving bond as required by law in the sum of $500.

(Sgd.) W. H. HUNT,
U. S. Circuit Judge.

United States Circuit Court of Appeals for the Ninth Circuit.

JOSEPH W. COX, Appellant,

vs.

ETHEL HART, Appellee.

Assignment of Errors.

Comes now the defendant and appellant in the above entitled case and files the following assignment of errors upon which he will rely upon the prosecution of the appeal in the above entitled cause, from the decree made by this Honorable Court on the 3rd day of January, 1921;

I.

That the United States Circuit Court of Appeals, for the Ninth Circuit, erred in awarding judgment to the appellee, and in not directing and causing to be entered a judgment dismissing the said bill of complaint.

II.

That the said Court erred in holding that the lands in question occupied the status of unsurveyed lands since March 31st, 1906, it duly appearing from the undisputed evidence that the said lands were surveyed, and survey thereof approved by and under the authority of the Department on or about the year 1857, and that fact being admitted in the pleadings herein.

III.

That the said Court erred in holding that the lands were unsurveyed land, and it being admitted in the plaintiff's bill of complaint that they had been prior thereto surveyed and such fact being admitted upon the hearing before the land department and before this Court. Said Court erred in holding that the Act of March 28th, 1908, applied to this controversy, it being apparent from the said act itself that it only applied to lands which had never been surveyed,

and in this that it was shown by the uncontroverted evidence and admissions of the parties that the defendant Cox made a proper and valid application for the lands in question, on July 17th, 1907, which said application should have been by the local land office, and by the Department of the Interior recognized and allowed, and which said application must, in equity, be deemed to have been allowed at the time when it was presented.

IV.

The said Court also erred in holding that there was any merit in the claim of the plaintiff that she was prior in time as to application for the land in controversy, it appearing from the admissions and uncontroverted evidence introduced that she never made any application for the land in controversy until May 15th, 1909, and long after Cox had made cut and filed proper application therefor. The said Court erred in not ordering and causing to be entered judgment in favor of the plaintiff herein in this that it appeared from the admissions and uncontroverted evidence that the land in question was open to desert land entry on July 17, 1907, at which time the said defendant made out and filed proper application therefor, and which application should have been allowed, and which application must in equity be deemed to have been allowed at that time, and the said Cox has since complied with the law in all respects, and has made final proof and final payment for the said land, and has received patent of the United States therefor, and also in this that it appears from the uncontroverted evidence and the admissions of the parties herein that the said land was desert land, open to entry under the desert land act on March 1st, 1909, and that on that date the said Joseph W. Cox, filed proper application to make desert land entry of said land. That he was the first person to make desert land application for said land, and that no other person had, or had acquired, any right to make entry of said land, superior to said Cox, and that he was the first person to make such application, and that his application was duly allowed by the Department of the Interior, and that he thereafter complied with the law, and made due final proof and payment therefor, and duly received patent of the United States therefor.

V.

The said Court erred in holding that the Act of March 28th, 1909, had any application to this controversy, it being shown that appellee did not take possession of the tract in controversy, or any part thereof, prior to survey thereof.

VI.

The Court erred in holding that the Act of March 28th, 1908, had any retroactive effect, it being apparent from its terms and from the general legislation on the subject as well as from the ordinary rules

of statutory construction that the said act was intended to operate prospectively only.

VII.

The Court erred in holding that the appellant's metes and bounds application, made in July, 1907, was rejected on account of defective description, the Secretary of the Interior having correctly decided afterward that the said application was rejected solely by reason of the error of the local office and the Commission of the General Land Office, and such being the fact.

VIII.

The Court erred in holding that it was material whether or not the said land was vacant or unoccupied on July 17, 1907, when the appellant Cox made his metes and bounds application, inasmuch as the desert land law does not prohibit the entry of occupied land.

IX.

The Court erred in holding that the land in question was at the time not vacant and unoccupied as the undisputed evidence showed no occupation of any person whatever, but only that the appellee had plowed a furrow around the land in question which did not constitute occupation within the meaning of any public land law.

X.

The Court erred in holding that at the time when the claim of the appellee was initiated the land was unsurveyed land for the reason that the desert land law did not permit of the initiation of a claim under the desert land law by occupancy, or otherwise than by proper application at the Land Office, until after the passage of the act of March 28th, 1908, whereas Cox by his application of July, 1907, had acquired an absolute right to make entry of the land.

Wherefore, appellant prays that said decree be reversed, and the said Circuit Court of Appeals for the Ninth Circuit and the District Court for the Southern District of California, Southern Division, be ordered to enter a decree reversing the decision of said Court in said cause, and for his costs.

(Sgd.) C. L. BROWN,
Solicitor for Appellant.

[Endorsed:] Petition for Appeal and Assignment of Errors on Appeal to Supreme Court U. S. Filed March 23, 1921, F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

JOSEPH W. COX, Appellant,

vs.

ETHEL HART, Appellee.

Bond on Appeal.

Know all men by these presents, that we, Joseph W. Cox, as principal, and S. D. Ulrey and Henry L. Jackson as sureties, are held and firmly bound unto Ethel Hart in the sum of Five Hundred Dollars, lawful money of the United States, to be paid to her and her executors, administrators and successors; to which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and each of our heirs, executors and administrators, by these presents.

Sealed with our seals and dated this 21st day of March, 1921.

Whereas, the above named defendant Joseph W. Cox has appealed from a judgment rendered against him in the above entitled cause, to the Supreme Court of the United States, to secure a reversal of the said judgment in the said cause.

Now therefore, the condition of this obligation is such that if the above named Joseph W. Cox shall prosecute his said appeal to effect and answer all costs if he fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

(Sgd.) JOSEPH W. COX.
(Sgd.) S. D. ULREY.
(Sgd.) HENRY L. JACKSON.

STATE OF CALIFORNIA,
County of Imperial, ss:

On this 24th day of March, 1921, personally appeared before me S. D. Ulrey and Henry L. Jackson respectively known to me to be the persons described in and who duly executed the foregoing instrument as parties thereto, and respectively acknowledged, each for himself that they executed the same as their free act and deed for the purpose there set forth.

And the said S. D. Ulrey and Henry L. Jackson being respectively by me duly sworn, says each for himself and not one for the other, that he is a resident and householder of the said County of Imperial, and that he is worth the said sum of Five Hundred Dollars, over and above his just debts and legal liabilities, in property exempt from execution.

(Sgd.) S. D. ULREY.
(Sgd.) HENRY L. JACKSON.

Subscribed and sworn to before me this 24th day of March, 1921.

[SEAL.] (Sgd.) ESTHER A. McLEAN,
Notary Public in and for the County of Imperial, State of California.

Approved as to form.
(Sgd.) W. H. HUNT,
United States Circuit Judge.

[Endorsed:] Bond on appeal to Supreme Court U. S. Filed March 28, 1921. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

JOSEPH W. COX, Appellant,

vs.

ETHEL HART, Appellee.

Præcipe for Transcript of Record.

To the Clerk of said Court:

Please prepare and certify the record on appeal in the above entitled cause, and include therein all papers appearing in the transcript of record from the District Court, and in addition thereto, the endorsements thereon showing the filing and your record showing the appearances, the judgment and opinion of the Court, the petition for rehearing, the order of the Court thereon, the petition for appeal, the Court's order allowing the same, the bond on appeal, and the Court's order approving the same, this præcipe, all orders made in your Court, and also all endorsements upon papers hereinabove mentioned.

(Sgd.) C. L. BROWN,
Solicitor for Defendant and Appellant.

[Endorsed:] Præcipe for transcript of record on appeals to Supreme Court U. S. Filed March 23, 1921. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

JOSEPH W. COX, Appellant,

vs.

ETHEL HART, Appellee.

Supplemental Præcipe for Transcript of Record.

To the Clerk of said Court:

In addition to the matters included in the præcipe heretofore sent you in the above entitled action, please include in the record the citation herewith enclosed.

(Sgd.) C. L. BROWN,
Solicitor for Defendant and Appellant.

[Endorsed:] Supplemental Præcipe for Transcript of Record on Appeal to Supreme Court U. S. Filed March 28, 1921. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3526.

JOSEPH W. COX, Appellant,

vs.

ETHEL HART, Appellee.

Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record upon Appeal to the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing Two Hundred and Fifty-three (253) pages, numbered from and including 1 to and including 253, to be a full, true and correct copy of the record under Rule 8 of the Supreme Court of the United States, in the above-entitled cause, including the Assignment of Errors on Appeal to the Supreme Court of the United States and of all proceedings had, and of all papers, including the Opinion filed in the said Circuit Court of Appeals in the above-entitled case, made pursuant to præcipe and supplemental præcipe of counsel for the appellant filed, respectively, March 23d and March 28, 1921, as the originals thereof remain on file and appear of record in my office, and that the same constitutes the transcript of record upon appeal to the Supreme Court of the United States in the above-entitled cause.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 7th day of April, A. D. 1921.

[Seal of United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk.

By PAUL P. O'BRIEN,
Deputy Clerk.

In the Supreme Court of the United States.

JOSEPH W. COX, Appellant,

vs.

ETHEL HART, Appellee.

Citation.

UNITED STATES OF AMERICA, *ss:*

To Ethel Hart, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, D. C., within Sixty (60) days from the date of signing this Citation, pursuant to an order allowing an appeal, filed in the Clerk's office of the U. S. Circuit Court of Appeals, in and for the Ninth Circuit, wherein Joseph W. Cox is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in said order allowing appeal mentioned, should not be corrected, and why justice should not be done to the parties in that behalf.

Witness the hand of the Honorable William H. Hunt, Circuit Judge for the Ninth Circuit, this 28th day of March, in the year of our Lord One Thousand Nine Hundred Twenty-one, and Independence of the United States the one hundred and forty-fifth.

W. H. HUNT,
U. S. Circuit Judge, Ninth Circuit.

UNITED STATES OF AMERICA,
State of California, ss:

Service of the annexed citation and receipt of a true copy of the same is hereby acknowledged at the offices of the undersigned attorneys of record for the appellee, Ethel Hart, at Los Angeles, in the County of Los Angeles, State of California, on the 1st day of April, 1921.

GEO. H. P. SHAW,
WM. J. HUNSAKER,
E. W. BRITT,
T. B. COSGROVE,
Attorneys for Appellee, Ethel Hart.

[Endorsed:] Docketed. No. 3526. In the Supreme Court of the United States. Joseph W. Cox, Appellant, vs. Ethel Hart, Appellee. Citation. Filed Apr. 6, 1921. F. D. Monckton, clerk, by Paul P. O'Brien, deputy clerk. C. L. Brown, El Centro, Cal., attorney for appellant.

Endorsed on cover: File No. 28,245. U. S. Circuit Court Appeals, 9th Circuit. Term No. 888. Joseph W. Cox, appellant, vs. Ethel Hart. Filed April 23d, 1921. File No. 28,245.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 306.

JOSEPH W. COX, APPELLANT,

vs.

ETHEL HART, APPELLEE.

OPENING BRIEF FOR APPELLANT.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Statement of Facts.

INTRODUCTION.

This case has been in litigation for fourteen years: first, resulting in a California Supreme Court decision in favor of Hart upon the question of *possessio pedis*, 153 Pacific, 391; second, resulting in the Interior Department decision in favor of Cox upon the question of priority under and in compliance with the Desert Land law (Cox ultimately received United

States public-land patent), 42 Land Dec., 596; third, resulting in preliminary decisions in favor of Hart in the Federal courts below. Briefly, the courts below and the Interior Department differ in the construction of the Act of July 1, 1902, 32 Stat., 728, and of the Act of March 28, 1908, Section 1, 35 Stat., 52.

The Imperial Valley was surveyed in 1854 to 1857. Settlement therein did not start until 1900. Private retracements of the old surveys then made were so erroneous that Congress, at the request of the Interior Department, authorized a resurvey by the Act of July 1, 1902, 32 Stat., 728:

> "That the Secretary of the Interior be, and he is hereby, authorized to cause to be made a resurvey of the lands in San Diego County, in the State of California, embraced in and consisting of the tier of townships thirteen, fourteen, fifteen, and sixteen south, of ranges eleven, twelve, thirteen, fourteen, fifteen, and sixteen east, and the fractional township seventeen south, of ranges fifteen and sixteen east, all of San Bernardino base and meridian; and all rules and regulations of the Interior Department requiring petitions from all settlers of said townships asking for resurvey and agreement to abide by the result of the same so far as these lands are concerned are hereby abrogated: *Provided,* That nothing herein contained shall be so construed as to impair the present *bona fide* claim of any actual occupant of any of said lands to the lands so occupied."

From a raw desert in 1900 the valley became largely populated with several cities and towns and great areas reclaimed by the time the first resurvey plats were filed in 1909. There were numerous conflicts owing to the severe competition for

the limited area of lands within irrigation districts. Hence the question of priority under the Desert Land law became all important.

Many whose applications were found upon contest to be subsequent in time to others claimed to have established rights by boundary plow furrows and other evidences of prior occupancy, and alleged that from July 1, 1902, the lands were unsurveyed, and that their rights had been initiated in accordance with the Act of March 28, 1908, Section 1, 35 Stat., 52, which was claimed to be retroactive, reading as follows:

> "*That from and after the passage of this act* the right to make entry of desert lands under the provisions of the act approved March third, eighteen hundred and seventy-seven, entitled 'An act to provide for the sale of desert lands in certain States and Territories,' as amended by the act approved March third, eighteen hundred and ninety-one, entitled 'An act to repeal timber-culture laws, and for other purposes,' shall be restricted to surveyed public lands of the character contemplated by said acts, and no such entries of unsurveyed lands shall be allowed or made of record: *Provided, however,* That any individual qualified to make entry of desert lands under said acts who has, prior to survey, taken possession of a tract of unsurveyed desert land not exceeding in area three hundred and twenty acres in compact form and has reclaimed or has in good faith commenced the work of reclaiming the same, shall have the preference right to make entry of such tract under said acts, in conformity with the public land surveys, within ninety days after the filing of the approved plat of survey in the district land office."

The Department holds, first, that the Act of July 1, 1902, *supra*, did not change the surveyed lands to the status of unsurveyed lands; second, that prior to March 28, 1908, a right to desert lands could be initiated only by an application; third, that the Act of March 28, 1908, Section 1, *supra*, authorizing the taking possession of unsurveyed desert lands and commencing the reclamation thereof and giving a preference right therefor, had no application to the Imperial Valley because there were no unsurveyed lands therein; and, fourth, that the provisions of the said Act of March 28, 1908, Section 1, *supra*, are not retroactive (Hart *v.* Cox, 42 Land Dec., 592).

Both the District Court (Rec., p. 67) and the Circuit Court of Appeals (Rec., p. 224) decide all four questions the other way.

Proceedings So Far.

Ethel Hart, the plaintiff below and appellee here, on November 8, 1918, filed this "Bill to declare trust as to real property (the 160 acres described as tract No. 113, section 8, township 14 south, range 15 east, San Bernardino meridian, Imperial County, formerly San Diego County, State of California (Rec., pp. 135 and 136), and under the 1855 plat (Rec., p. 129) as the S. E. ¼ of section 13, township 14 south, range 14 east (Rec., p. 135), and to obtain a decree requiring defendant (who had received public-land patent therefor) to convey the legal title thereto to plaintiff (Rec., p. 40),)" against Joseph W. Cox, defendant below and appellant here, in the United States District Court for the Southern District of California. Final decree, entered February 3, 1920, in her (Ethel Hart's) favor (Rec., p. 65)

was affirmed by the United States Circuit Court of Appeals for the Ninth Circuit January 3 and February 14, 1921, 270 Fed., 51 (Rec., pp. 227 and 233). Cox has appealed to this court (Rec., pp. 233 and 234). The ten grounds of the said appeal (Rec., pp. 233 and 236) are summarized by the headings of chapters I to IV, inclusive.

Cox Receives Patent.

The reasons why Cox received patent are reported in Hart *v.* Cox, 42 Land Dec., 296. See also chapter I.

On July 17, 1907, Joseph W. Cox filed in the local land office at Los Angeles an application to enter the land now described as tract No. 113 under the Desert Land act of March 3, 1877, Section 1 (19 Stat., 377), as amended by the Act of March 3, 1891, Section 2 (26 Stat., 1095), the Act of March 28, 1908, Section 1 (35 Stat., 52), not then being in existence.

> "Prior to the passage of the said Act of March 28, 1908, no desert land right could be initiated, upon lands surveyed or unsurveyed, except by the filing of an application." Hart *v.* Cox, *supra*, p. 594.

His was the first application in point of time filed for said land (Rec., p. 185). It described the land by metes and bounds, *by reference to the lines of the 1856 survey* and by reference to the lines of the resurvey as afterwards adopted (Rec., pp. 53 and 54). It was a precise description sufficient to identify the lands so that the Government surveyor surveyed and platted it as "Tract 113" (Rec., pp. 134, 135, and 136). It was clearly within the pending Commissioner's order of May 24, 1907 (Rec., p. 140), *as it described the land*

with reference to the 1854-7 surveys. It was sufficient within the Commissioner's order of January 18, 1910 (Rec., p. 146). It was finally upheld by the decision of the Secretary of the Interior, 42 Land Dec., 592 (Rec., p. 181). Cox's right, therefore, relates back to July 17, 1907, the date of his initiation of a right to the land under the law (Sturr *v.* Beck, 123 U. S., 541; Peyton *v.* Desmond, 129 Fed., 1).

The register and receiver, however, on July 23, 1907, erroneously rejected the application (Rec., pp. 18 and 54), and this action was affirmed by the Commissioner of the General Land Office October 3, 1910 (Rec., pp. 18 and 53). The Secretary held that it should have been allowed, 42 Land Dec., 596. The doctrine of relation applies even if the application was erroneously rejected (Weyerhaeuser *v.* Hoyt, 219 U. S., 380).

On February 24, 1909, the plat of resurvey having been filed, Cox, without abandoning his old application, which was still pending, on March 1, 1909, filed a further application describing the land as tract No. 113. Cox was also first in time to file upon the land after the resurvey (Rec., p. 185). See Commissioner's orders (Rec., p. 151; also p. 146). See also C. C. Gingery, 45 Land Dec., 50, 54, that such a new application was regarded as an application to amend the original application to give it the latest official description.

Ethel Hart also filed two applications, both *later in time* than the Cox applications, 42 Land Dec., 295. Her applications both included all of tracts No. *113,* 114, and the S. ½ of 115. (She ultimately received patent to tracts No. 114 and S. ½ of No. 115.) Her first application, of July 30, 1907 (Rec., p. 17), was rejected November 7, 1907 (Rec.,

p. 16), and the rejection was affirmed by the Commissioner of the General Land Office October 3, 1910 (Rec., p. 17). Her second application, after the filing of the plat of resurvey on February 24, 1909, was filed on May 15, 1909 (Rec., p. 21) (also later than Cox's second), describing the land as tracts Nos. 113, 114, and the S. ½ of 115.

On October 13, 1911 (Rec., p. 162), a hearing was directed by the Commissioner of the General Land Office to determine the relative rights of Hart and Cox as to tract No. 113 and was duly held January 25, 1912 (Rec., p. 68). On April 29, 1912, decision was rendered *in favor of Joseph W. Cox* by the register and receiver (Rec., p. 162). On December 7, 1902, the Commissioner of the General Land Office reversed the decision of the register and receiver (Rec., p. 170) and decided *in favor of Ethel Hart.* Upon appeal the Secretary of the Interior, on August 5, 1913, 42 Land Dec., 592 (Rec., p. 181), rendered a decision holding that *Joseph W. Cox was entitled to the land,* reversing the Commissioner's decision and affirming the decision of the register and receiver in favor of Cox. Also, on January 29, 1914, 42 Land Dec., 595, the Secretary again, on motion for rehearing, decided *in favor of Joseph W. Cox.*

On March 4, 1914, Joseph W. Cox's desert-land entry was allowed for tract No. 113, and on September 25, 1916, Cox offered final proof. On November 28, 1916 (Rec., p. 29), Hart again filed protest against Cox. On November 28, 1916 (Rec., p. 32), Cox made final proof. The register and receiver *dismissed the new Hart contest March 30, 1917,* which action was affirmed by the Commissioner August 8, 1917, and the Secretary on November 17, 1917, except that these decisions held that Hart would be entitled to show any

alleged default subsequent to the allowance of the Cox entry (Rec., pp. 35 to 37). *No further hearing to prove Cox's alleged non-compliance was asked by Ethel Hart.* On June 14, 1918 (Rec., p. 37), final certificate was issued to Joseph W. Cox.

On October 24, 1918 (Rec., p. 37), a United States patent to tract No. 113 was issued to Joseph W. Cox, the defendant in the case below and the appellant here.

Ethel Hart Was Denied Patent.

Ethel Hart claims a prior right to tract 113 by reason of plow furrows and other alleged acts of occupancy prior to July 17, 1907, the date of the application of Cox (Rec., pp. 163 and 164).

In November, 1905, J. W. Hart made some sort of a symbolical claim to the land for his daughter, Ethel Hart. The departmental record shows he ran a furrow as a boundary line around two contiguous quarter sections of land, 320 acres in extent, now known as tracts Nos. 113, 114, and the S. ½ of 115, and posted a notice on the land claiming the land for *Ethel Hart, who was then a minor.* What he actually did is immaterial. On January 30, 1906, Ethel Hart became of age. She filed an application July 30, 1907. Prior thereto, on February 1, 1906, on tract No. 114 (*not* on tract No. 113, the land in question), 80 acres were cleared, leveled, fenced, seeded to barley, and pastured to hogs. The following acts only were done upon tract *No. 113,* now in question: Aside from the plow-furrow boundary, in February, 1906, four unfenced acres of barley were planted on the southeast quarter of tract No. 113, but it was not watered, but abandoned and the land quickly reverted to its desert condi-

tion and no crop resulted. See as to such actions Heflin *v.* Schnare, 40 Land Dec., 261, 263. On November 16, 1906, certain stakes were set along the east side and a brother plowed certain furrows along the east side of tract 113, claiming that these were preparatory to a ditch and to borders.

On November 8, 1906, Cox established settlement on the west side of tract No. 113, *peaceably and in broad daylight.* There were no actual improvements on tract 113; nothing at all where he settled but the boundary-plow furrow. He did not interfere with tracts Nos. 114 and 115. He resided upon the land, *actually improved it,* and worked upon it to the date of his application, and continued thereafter until ejected therefrom under the following circumstances:

Ethel Hart, as plaintiff, on February 4, 1908 (Rec., p. 10), brought an action of ejectment against Joseph W. Cox, defendant, in the Superior Court of California for the County of Imperial for the possession of said land later known as tract No. 113. At this date both parties had rejected applications only; hence neither could show "a paper title." The plaintiff, Ethel Hart, won entirely upon her alleged prior possession of the entire area now known as tracts 113, 114, and the S. ½ of 115, containing 320 acres, and her improvements upon tracts No. 114 and the S. ½ of 115. Judgment for Hart, February 10, 1909 (Rec., p. 11), was affirmed November 22, 1915 (Rec., p. 12), in the California Supreme Court in the case of Hart *v.* Cox, 153 Pacific, 391, 392, the court holding "neither appellant nor respondent relied upon a paper title;" also that the alleged prior "possession" of Hart was sufficient to maintain the action. Compliance with a public-land law was not discussed by the

county court (Rec., p. 107 *et seq.*) or by the Supreme Court. On March 3, 1909, the sheriff of Imperial County put Hart in possession of tract No. 113 and dispossessed Cox (Rec., p. 12). Such an action in the State court bears solely upon the question of possession (Northern Pacific *v.* McComas, 250 U. S., 387, 392, and Gautier *v.* Morrison, 232 U. S., 452, 561). The Department is not controlled by such a judgment, as the Department alone can adjudicate compliance with the land laws prior to patent (Hall *v.* Armann, 41 Land Dec., 430).

In the court decisions favorable to Ethel Hart her 320-acre claim was considered as a whole, the good improvements on tract 114 and the S. ½ of 115 featured, while the symbolical acts on tract 113 were not considered as affecting that tract alone.

The Department, however, held that on July 17, 1907, an application in the Land Office initiated the right under the Desert Land law, not plow furrows and the like on the land itself; that as Ethel Hart could show no application prior to that of Cox, she was denied the patent (Hart *v.* Cox, 42 Land Dec., 592. See also Kendall *v.* Bunnell, 37 Calif. App. Dec., 125, 142).

Special Note.

This brief was delayed after completion, waiting the decision and the publication thereof of the Court of Appeal for the State of California, Second Appellate District, Division 2, in the case of Kendall *v.* Bunnell, 37 Calif. App. Dec., 125, on January 11, 1922. Points of said decision are inserted herein.

The case of Kendall *v.* Bunnell, *supra*, and Hart *v.* Cox, involving many of the same propositions, were pending before the Department at the same time. Hart *v.* Cox, 42 Land Dec., 502, was decided August 5, 1913, and Kendall *v.* Bunnell (not reported) was decided August 19, 1913. The decisions upon the legal points were the same in both cases. The concluding paragraph of the court: *"Our conclusion is that the Secretary of the Interior did not err in any of his legal conclusions * * *."* (Italics ours.) This case has many points in common with Hart *v.* Cox, *supra*.

I.

Cox was awarded a patent to tract 113 because he filed the first application therefor at a time when the Desert Land Law provided no other method of initiating a right to desert lands, whether surveyed or unsurveyed, and, further, because he made a full compliance with the law thereafter.

Both the district court and the circuit court of appeals assume, because Ethel Hart desired to secure the land in question prior to Cox's application of July 17, 1907, she is first in time and first in right. This, however, is not the law. To be first in time legally *one must perform those acts which the law specifies will give priority.*

In Shepley *v.* Cowan, 91 U. S. (1 Otto), 330, this court says:

> "In all such cases, the first in time is *the commencement of proceedings for the acquisition of the title*, when the same are regularly followed up, is deemed to be the first in right." (Italics ours.)

The Act of March 3, 1877, Section 1, 19 Stat., 377, reads:

> "That it shall be lawful for any citizens of the United States or any persons of requisite age, 'who shall be entitled to become a citizen, and who has filed his declaration to become such' and upon the payment of 25 cents per acre—*to file a declaration* under oath with the register and receiver of the land district in which any desert land is situated, that he intends *to reclaim* a tract of desert land not exceeding one section, by conducting water upon the same, within a period of three years *thereafter.*"

Other provisions of the act make the law applicable to either *surveyed or to unsurveyed lands.* This act was amended by Section 2 of the Act of March 3, 1891, 26 Stat., 1097, which, among other things, reduced the quantity of land allowed a declarant from 640 to 320 acres. The next important amendment was Section 1 of the Act of March 28, 1908, 35 Stat., 52, which prohibited the filing of applications under the Desert Land Act for unsurveyed lands *"from and after the passage of this act."* The same section also provided that an occupant of unsurveyed desert lands would have a ninety days' preference right *after the survey.*

Prior to March 28, 1908, the desert-land statutes show no method of initiating a right under the Desert Land Act except *"to file a declaration;"* reclamation was to start *"thereafter."* Prior to March 28, 1908, no statute indicates that a preference right to enter desert lands may be obtained by running plow furrows, by driving stakes, by posting notices, by visiting, or the like.

Oren *v.* Peterson, 11 Copp's Land Owner, 221:

Oren and Peterson filed *simultaneous* applications for the same land. Both also claimed to have initiated rights by prior occupancy. Oren filed a *desert-land declaration* and Peterson filed a *pre-emption declaratory statement*. The Department held that Peterson, who claimed under the pre-emption law which recognized priority by settlement, must prevail: *"Oren acquired no rights whatever under his desert-land entry by his settlement and improvement until he filed his declaration."*

Selway *v.* Flynn, 6 Land Dec., 541:

Selway filed with the railroad company an application to purchase certain withdrawn land, believing that the land had been granted to the railroad. The railroad notified him of the receipt of his application, and that he had the prior right to purchase. He thereupon enclosed the land and began to improve it. Afterwards the railroad company was adjudged not entitled to the land. He thereupon deeded the land and his improvements to his wife, who filed a desert-land application therefor. Earlier on the same day, however, one Flynn filed a desert-land application for a portion of the land *prior to Mrs. Selway's application*. Mrs Selway's claim of prior equities because of prior improvement and enclosure was rejected, and Flynn's application was allowed, solely upon the ground *that Flynn's application was first in time*. The Secretary said:

> *"A claim to land under the Desert Land Act is initiated by the application to enter and not by an act of settlement."*

Charles Perrine, 3 Land Dec., 331, at 333:

The Secretary says the acts performed in compliance with the settlement laws do not constitute compliance with the Desert Land Law.

Mayer *v.* Dyer, 21 Land Dec., 187:

The initial act is the filing of the application.

The court of appeals in the instant case (Rec., p. 216) indicates that the object of Congress under the desert-land law is satisfied by the reclamation of arid lands, and that the mode of initiating rights under the desert-land law is of slight importance. All of the decisions of the Department prior to March 28, 1908, are contrary to this supposition. In T. C. Power and Brother, 33 Land Dec., 154, the Secretary says:

> "It is urged in substance that the purpose of the desert-land law is to secure the reclamation of arid lands and that where one reclaims a tract of such land by the expenditure thereon of the amount of money prescribed by law, and makes the required proof and payments, he should be given a patent for the land regardless of whether or not he has complied with the requirements of the law in other respects. This position is not tangible. The law required certain things to be done by the persons desiring to make an entry under such statute prior to the allowance of the entry, and *until these preliminary acts are performed, he has no rights to the land nor any authority to take possession of it.* The law requires him to do certain things after his entry is allowed but the doing of these things will not entitle him to a patent or give him any valid claim to the land if he has failed to perform the preliminary acts prescribed by law. It is not

> sufficient for him to show that he has reclaimed the land by the expenditure of the amount prescribed and that he has made the final proof and payment required by law. This will not entitle him to a patent, *if he has not filed the declaratory statement,* made the preliminary payment, and had his entry recorded as the law requires." (Italics ours.)

Specifically, within the Imperial Valley the Department holds that right to the desert lands within the Imperial Valley can be initiated under the desert-land law only by the filing of an application and not by occupancy:

Henderson T. Dizney, 41 Land Dec., 257.
Hart *v.* Cox, 42 Land Dec., 592.
Wilson *v.* Carson, 43 Land Dec., 346.
See also C. C. Gingery, 45 Land Dec., 50.

We point out in Chapter II—I, the one supposed exception, the case of Virgil Patterson, 40 Land Dec., 264, does not affect this case.

In the recent case of Kendall *v.* Bunnell, 37 Calif. App. Dec., 125, 142, the court says in an Imperial Valley case involving the same contention:

> "The title was in the United States. Occupation did not and could not initiate any right thereto. A rightful claim under the Desert Land Act could be initiated only by filing a sufficient application to make entry (Wilson *v.* Carson, 43 Land Dec., 346). This the plaintiff did not do. He did not, prior to defendant's application, file such an application as would give him any right to enter the land. * * * He could not, by simply taking possession, claiming the land as his own and doing things that gave him

> no preference right, estop the defendant from acquiring title in the manner provided by the acts of Congress and the regulations of the land department. Our conclusion is that the Secretary of the Interior did not err in any of his legal conclusions * * *."

The situation under the desert-land law prior to March 28, 1908, is somewhat similar to that under the homestead laws prior to May 14, 1880. This court held that mere *occupancy* under the homestead law prior to May 14, 1880, where the law required an *application* to initiate a right thereunder, availed the applicant nothing.

> "At the time of these transactions, *the mere occupation* of the land for the purpose *at some subsequent time* of entering it for a homestead, gave to the party so entering no rights. *The law* in force, 12 Stat., 392, *made the entry* at the local office *the initial fact.*" Maddox v. Burnham, 156 U. S., 544. (Italics ours.)

If the Department of the Interior is wrong, it has been wrong for forty-five years, and thousands of acres have been patented under this construction and many more thousands of dollars have been invested thereunder.

In Logan *v.* Davis, 233 U. S., 613, 627, this court says:

> "Many thousands of acres have been patented to individuals under that interpretation, and to disturb it now would be productive of serious and harmful results. The situation, therefore, calls for the application of the settled rule that the practical interpretation of an ambiguous or uncertain statute by the executive department charged with its administration is entitled to the highest respect, and, if acted upon

for a number of years, will not be disturbed except for very cogent reasons. United States *v.* Moore, 95 U. S., 760, 763; Hastings and D. R. Co. *v.* Whitney, 132 U. S., 357, 366; United States *v.* Alabama G. S. R. Co., 142 U. S., 615, 621; Kindred *v.* Union P. R. Co., 225 U. S., 582, 596."

We therefore submit that the courts below are erroneous in holding that Cox did not initiate the first legal right to the land by his application of July 17, 1907.

II.

Hart's challenge of the Cox patent falls at the outset because on July 17, 1907, the land in question was surveyed and not unsurveyed. Hence the Act of March 28, 1908, Section 1, 35 Stat., 52, under which she claims priority, has no application.

A. THE COURTS PROFESS TO FOLLOW THE CONTEMPORANEOUS CONSTRUCTION AND ORDERS OF THE LAND DEPARTMENT IN ITS ADMINISTRATION OF THE SURVEYS AND CLAIMS AFTER THE PASSAGE OF THE ACT OF JULY 1, 1902, SUPRA. THEIR ASSUMPTION IS ERRONEOUS, AS THE FOLLOWING PRESENTATION OF THE SITUATION WILL SHOW.

INTRODUCTION.

See Circuit Judge Gilbert's statement (Rec., p. 226) and District Judge Trippet's statement (Rec., p. 82) that the courts are following the Land Department's construction of the Act of July 1, 1902, *supra*.

1. The Land Department in its administration of the Act of July 1, 1902, supra, could not ignore the evidences of the existence of the old surveys of 1854-7. This survey was admitted and relied upon by both parties.

During the years 1854 to 1857 the Imperial Valley was surveyed and plats were approved, recorded, and filed. *These original surveys were actually made upon the ground,* but, there being no demand for the lands for settlement for some forty-five years thereafter, *there was no periodical replacement of lost and obliterated corners;* hence sand storms, erosion, rains, intense heat, and growth of sage brush, grease wood, and mesquite alone would cause a widespread loss and obliteration of survey monuments where no human agency interfered.

The plaintiff in her declaration (Rec., pp. 16 and 17) alleges that she knew and adopted the location of the 1856 survey. Surveyor Bothwell (Rec., p. 117), the expert witness for the plaintiff, testified that he knew the location of the survey of 1856 (Rec., p. 121); that he *found natural objects and monuments referred to in the 1854-7 field-notes.* Cox tied the lines of his claim in his application to the *old (1856) survey* (Rec., p. 54). L. Friel, for the defendant, also found original monuments and natural objects referred to in the field-notes of the old surveys (Rec., p. 127). The Department knows, not only that there was an old survey, but also *knows where its lines run* (C. C. Gingery, 45 Land Dec., 50, 51).

The California courts do not allow the genuineness of the old surveys to be questioned (Miller *v.* Marchus, 171 Calif., 257).

2. The Act of July 1, 1902, supra, was recommended because of the gross inaccuracies of the private retracements of the old surveys of 1854-7.

It is a matter of common knowledge that private restorations of the monuments of the public-land surveys are of so ordinary and usual an occurrence that they are regulated by the Department: Circulars of March 13, 1883, 1 Land Dec., 671; October 16, 1896, 33 Land Dec., 361, and June 1, 1909, 38 Land Dec., 1. Without such periodical replacements confusion would ensue, as the Government does not periodically replace lost and obliterated corners. Public-land entries are frequently made in accordance with the private retracements and no question arises.

"About 1900 this section of the country (Imperial Valley) was occupied by land companies with a view to reclaiming the lands by irrigation and to induce settlers to occupy them:" Fanny A. Salisbury, 39 Land Dec., 471. Thereafter reclamation began, followed by a settlement.

These companies made numerous, but inaccurate, private retracement surveys within the valley. F. A. Salisbury, 39 Land Dec., 471; H. H. Peterson, 40 Land Dec., 562; Stephenson *v.* Pashgian, 42 Land Dec., 113, and testimony of Surveyor Friel (Rec., p. 128). Witness Bothwell, for the plaintiff below, testified (Rec., p. 117) that he made private surveys of several townships; that while it was possible for a skilled surveyor to ascertain the lines of the 1854-7 surveys and to apportion the excess, his private surveys were in the interest of private companies (Rec., p. 124); that by prorating the excess among the townships affected the private companies might have to furnish water for 700 or 800 acres

for certain sections; *hence* his *private surveys were deliberately erroneous in throwing the excess areas into strips between townships which, according to these private plats of survey, were called "Excess strips," referred to in the record, page 77, and in the decisions* (Stephenson *v.* Pashgian, 42 Land Dec., 113, 114).

It is important to understand this, because the Government cannot consistently question its own surveys merely because private individuals have grossly misrepresented the locations thereof.

Fanny A. Salisbury, 39 Land Dec., 471, at 492:

> "It was soon discovered that the conflict between the different surveys (private surveys) and with the Government survey was so great as to be irreconcilable. *This led to the passage of the Act of July 1, 1902* (32 Stat., 728). (Italics ours.)

3. The first official step taken by the Department after the passage of the Act of July 1, 1902, supra, and in accordance therewith, after finding evidences upon the ground of the old survey, was to direct and to approve the restoration of the fourth standard parallel south as located in 1854-7, and to base the township lines thereon, prorating and apportioning the known excess among the townships resurveyed. The resurveys were run according to the departmental manual of surveying.

After the Act of July 1, 1902, *supra,* was passed, the first act of the Department thereunder was to employ Surveyor Henderson to find the *fourth standard parallel south* under the surveys of 1854-7 His location was approved (40 Land

Dec., 562). Thereafter he (and others) ran the lines of several townships from this re-established fourth standard parallel south, among which was the township here in question (Rec., p. 135). Surveyor Friel explains that, based upon the old surveys, it was necessary to apportion the excess and prorate the areas among the townships resurveyed (Rec., p. 132).

The resurveys were conducted according to the regular Interior Department Manual (Rec., p. 133).

The Department knows the locations of the old surveys (C. C. Gingery, 45 Land Dec., 50, 51).

Taking the township in question as an example, the plat shown (Rec., p. 136) contains the following information: The exterior lines of the township were surveyed by Henderson in 1903, the west boundary was retraced in 1906, the section lines were resurveyed in 1906, the claim boundaries and the school sections were surveyed in 1906, and the claims were tied to the section lines in 1906. The plat itself was approved in 1908 and placed of record in 1909.

4. After the fourth standard parallel south had been established and the township and section lines had been run, the Department decided to accept the burden of surveying upon the ground every claim existing prior to April 1, 1906, not July 1, 1902, and to delineate such claims upon the plats of resurvey.

The record, page 148, shows the various conflicting plats from which applicants got descriptions of the subdivisions of the lands desired. As a result, the Department, finding no other way of reconciling these descriptions, decided to sur-

vey and plat every claim as it existed on the ground. This was no recognition of the private surveys (F. A. Salisbury, 39 Land Dec., 471). It was a monumental task undertaken for the purpose of doing justice by having the Department straighten out the conflicts in *location*. This is more fully explained in the cases of Fanny A. Salisbury, 39 Land Dec., 471; Herman H. Peterson, 40 Land Dec., 562; Henderson T. Dizney, 41 Land Dec., 257, and the Commissioner's order of January 18, 1910 (Rec., pp. 147 and 148). All claims were to be surveyed as "tracts," no matter what means of identification was employed by the claimants (Rec., pp. 147 and 148).

March 31, 1906, not July 1, 1902 (the date of the resurvey act), was the arbitrary date set as the last date on which initiated claims could be platted upon the plats of resurvey, whether the claims were initiated before or after July 1, 1902. Any claim initiated on or prior to that date *would* be platted; all claims initiated subsequently to that date *would not* be platted (Rec., p. 141). As shown in the case of H. H. Peterson, 40 Land Dec., 562, at 566 and 567, *only claims of record at the Los Angeles land office were placed upon diagrams and furnished to the surveyors. Occupancy claims not of record were not included.* This would have barred Ethel Hart completely had she not made her application of July 30, 1907, before the date when the survey of the claims was run. The instructions to surveyors read: "you are required to survey out by metes and bounds all valid *entries* made in the townships embraced in your contract before April 1, 1906, and all school lands in said townships" (40 Land Dec., 556, 557).

5. In the procedure of the Land Department under the Act of July 1, 1902, the plats of 1854-7 were constantly in use and were never, even to this day, abandoned, stricken, or canceled. Records of entries were kept in accordance therewith down to the filing of the plats of resurvey. The old plats are still of evidential value as to the location of lands entered prior to the filing of the plats of resurvey.

The old plats are still of record (Rec., p. 129).

They are an essential muniment of entries made prior to the resurveys (C. C. Gingery, 45 Land Dec., 50, 51).

From 1854-7 down to the filing of the resurvey plats in the local land office the old plats (1854-7) governed and entries were noted thereon. It was by information from records kept according to these old plats that the Department was enabled to adjudge which claims could be platted (40 Land Dec., 566, 567). In the case of H. H. Peterson *et al.*, 40 Land Dec., 562, 570, the Secretary says:

> "the records of the local land office at Los Angeles were being conducted according to the plats of the old original survey thereof."

6. At the same time that the Land Department, under its survey jurisdiction, was administering the Act of July 1, 1902, supra, it continued to receive applications and allow patents in accordance with the surveys of 1854-7 until 1904. Thereafter it continued to allow applications and entries, but not final papers, until 1906. That from March 31, 1906, down to the date of the filing of the plats of resurvey entries for desert lands only were allowed, but, under the orders, were required to be initiated by applications and described with reference to the lines of the 1854-7 plats.

No special circular relating to the Imperial Valley was issued until 1904. Applications were received and acted upon and patents issued as in ordinary cases without special instructions. However, by order dated September 13, 1904 (Rec., p. 139), the prior practice of allowing *final* papers was prohibited, but filing applications and entries under laws relating to surveyed lands continued down to March 31, 1906.

The telegram of March 30, 1906 (Rec., p. 137), reads as follows:

> "Suspend entries in townships 13 and 16 south, ranges 11 to 16 east, and in 17 south, ranges 15 to 16 east, S. B. M., after March 31, 1906."

Whether this ambiguous order constituted a suspension or not is immaterial here. Neither party presented an application or offered to present an application between March 31, 1906, and June 19, 1906 (Rec., p. 137), when the suspension, if it existed, was lifted.

The order of January 2, 1913 (Rec., pp. 160 and 161), says, regarding this order of March 30, 1906:

> "The reason for the suspension is to permit the valid rights acquired prior thereto (April 1, 1906) to be recognized in the resurvey and at the same time to prevent new rights to be subsequently acquired *based upon the old survey* of which the surveyor may not receive notice while the survey is being executed, and to recognize which would require subsequent survey and adjustment."

As to the claims initiated *after* March 31, 1906, *every order stated that claims must be initiated by record.* (Ex-

entries—hereinafter "settlement"—Rec., p. 161.) See order of June 19, 1906 (Rec., p. 137); order of May 24, 1907 (Rec., p. 140); order of July 19, 1907 (Rec., p. 142), and order of August 8, 1907 (Rec., p. 144).

The permanent order of May 24, 1907 (Rec., pp. 140, 148, 150, 151, and 156), recites that desert-land rights may be *initiated by record application* for any lands within the Imperial Valley "*the same as though the lands were surveyed*," that entries shall be allowed of these desert-land applications, but "no entry allowed subsequent to March 31, 1906, will be surveyed or noted on the plat of resurvey." The same order says (see Rec., p. 161):

> "All *applications for entries* filed subsequent to March 31, 1906, *must describe the land with reference to the established lines of the original survey*."

This is the order of May 24, 1907, often erroneously referred to as the order of March 31, 1906, which it is contended changed the status of the lands from surveyed to unsurveyed lands, when, by the very terms, *the old surveys are required to be followed*. The requirement that the applications shall refer to the lines of the original survey is justified by the Commissioner in his order of January 19, 1910 (Rec., p. 151). It was practical (C. C. Gregory, 45 Land Dec., 59). In no other way could entries be recorded (40 Land Dec., 579).

In Kendall v. Bunnell, 37 Calif. App. Dec., 125, at 129, the court says:

> "That is, under the terms of the Commissioner's instructions of May 24, 1907, *every desert-land entry was*

> *to be initiated in precisely the same manner as before the passage of the resurvey act of 1902, i. e.,* by an application describing the land by reference to the lines of the original survey; and, after being so initiated, the entry was to take the same course that it would have taken prior to the resurvey act of 1902, down to and including the final proof of reclamation, when, instead of issuing a patent describing the land in terms of the 1856 survey and as described by the entryman in his application to enter, it was intended that the Land Department at Washington, in order to adapt the final allowance of the entry and the description in the patent to the resurvey when completed, should withhold the issuance of the patent until the resurvey should be made and the plat thereof approved and filed, and then, when that was done, the Department would adjust the description in the entry to the lines of the resurvey and direct the issuance of a final receipt and patent describing the land according to such readjustment." (Italics ours.)

By the retroactive orders of July 19, 1907 (Rec., p. 142), and August 8, 1907 (Rec., p. 144), the order of June 19, 1906, was modified and the order of May 24, 1907, was continued. This limited further filings to desert-land applications, the ideal law for this arid region as it required reclamation. A claim requiring both a record according to the plats and also work on the ground immediately would reveal conflicts or the lack of conflicts. The lands in the Imperial Valley were largely taken up and a mass of applications not to be acted upon until after the filing of the plats of resurvey, such as authorized by the order of June 19, 1906, and which applications required no action on the ground, would foster and store up conflicts and would hope-

lessly jumble the departmental records. Rules to prevent conflict have been held valid. See Porter *v.* Landrum, 31 Land Dec., 352; Santa Fe Pacific *v.* Northern Pacific, 37 Land Dec., 669; Southern Pacific R. R. Co., 32 Land Dec., 51; Weyerhaeuser *v.* Hoyt, 219 U. S., 380; Hodges *v.* Colcord, 193 U. S., 192; McMichael *v.* Murphy, 197 U. S., 304, and Holt *v.* Murphy, 207 U. S., 407. See also Shepley *v.* Cowan, 91 U. S., 330.

It is true certain of the orders and decisions loosely refer to the lands under this order of May 24, 1907, as occupying the status of "unsurveyed lands;" order of August 8, 1907, and Virgil Patterson (40 Land Dec., 264). "'When the resurvey of the Imperial Valley was undertaken by the Government, desert-land entries were permitted therein as for unsurveyed land, but applications were required to describe the tracts desired by them according to the original survey' (Stephenson *v.* Pashgian, 42 Land Dec., 115)" (Kendall *v.* Bunnell, 37 Calif. App. Dec., 125, 130). The procedure as a whole, however, controls even though these loose expressions were relied upon by those who did not take the pains to inquire into the full situation.

B. THE COURTS' DECISIONS ARE ERRONEOUS IN HOLDING THAT THE ACT OF JULY 1, 1902, SUPRA, CALLED FOR AN ABANDONMENT OF THE OLD SURVEYS (Rec., pp. 82 and 226).

We quote from the recent decision of the District Court of Appeal of California, Second Appellate District, Division 2, January 11, 1922, in the case of Kendall *v.* Bunnell, 37 Calif. App. Dec., 125, at 128:

> "The United States Circuit Court of Appeals, in the case of Cox *v.* Hart, decided January 3, 1921 (270

Fed., 51), held that this act of July 1, 1902, was a legislative declaration that, until the resurvey should be made as authorized thereby, the lands were to be regarded as unsurveyed lands, the court saying: 'We are of the opinion that the court below properly held that at the time when the claims of the parties hereto were initiated the land was unsurveyed land. * * * The act of 1902 authorizing a resurvey was a legislative declaration that the lands were to be regarded as unsurveyed lands, that a new survey was to be substituted for the old, and that by the new survey the future disposition of the lands was to be regulated.' That case, we are informed, has been taken to the United States Supreme Court, where it is now pending. *Until the question shall have been decided by that tribunal, it cannot confidently be asserted that the act whereby Congress authorized such resurvey was or was not a legislative declaration that these lands should be regarded as unsurveyed lands until the new survey should be substituted for the old.* It is earnestly contended by the respondent that the law is as declared by the United States Circuit Court of Appeals, and that, from the date of the passage of the Act of July 1, 1902, until the plat of the resurvey was duly approved, the land in controversy had the status of unsurveyed land for all purposes, and that for that reason he possessed, for ninety days after the filing of the approved plat of the resurvey, the preference right given by the Act of March 28, 1908. Just as earnestly is it contended by appellant that the land has been 'surveyed' land at all times since the plat of the original survey of 1856 was approved by the authorized Department officers. *It must be conceded that the argument advanced by appellant to sustain this contention possesses much cogency and persuasive force.* However, as the sequel will show, the case can

be decided without undertaking to pass upon this interesting question; and we, therefore, shall assume, *for the purpose of this decision only*, that from the date of the passage of the act authorizing the resurvey until the approval of the plat of the resurvey these lands had the status of unsurveyed lands, as held by the Circuit Court of Appeals in the Cox case.

"Unless the original survey of 1856 was abrogated by some act of Congress, such, for instance, as this Act of July 1, 1902, so that, by congressional enactment, the lands resumed their original status of unsurveyed lands, no declaration to that effect by the officers of the Land Department could operate to place them in the category of unsurveyed lands; for, though the administration of the public-land system of the United States is intrusted to the Land Department, and the officers thereof, in the discharge of their official duties involving judgment or discretion, possess a wide latitude of discretionary authority, the Department, nevertheless, cannot override the express will of Congress, and cannot convey or refuse to convey public lands in disregard or in defiance of congressional enactment (Burfenning *v.* Chicago, etc., R. Co., 163 U. S., 321)." (Italics ours.)

In the case of Cox *v.* Hart, the Circuit Court of Appeals, 270 Fed., 221 (Rec., pp. 244, 226), Circuit Judge Gilbert says:

"The Act of 1902, authorizing a resurvey, *was a legislative declaration that the lands were to be regarded as unsurveyed lands*, that a new survey was to be substituted for the old, and that by the new survey the future disposition of the lands was to be regulated. By a proviso in that act, protection was afforded to the then existing claims of occupants.

> The inference follows that as to all whose rights were initiated thereafter, the resurvey was intended to be controlling." (Italics ours.)

The court goes on to say that this was the construction placed upon the law by the Interior Department. *We have seen, however, that in this the Circuit Court of Appeals is in error.* The Interior Department did not place any such construction upon the law when its practice as a whole and its construction and actions as a whole within the Imperial Valley are considered. While it is true that entries within the valley were limited to desert-land entries and certain of the decisions and circulars say that the lands occupied the status of unsurveyed lands, such terms and chance expressions must not be held to control the actual procedure of the Department as a whole.

The Circuit Court of Appeals also defends its construction of the law by its construction of the saving clause in which claimants prior to the resurveys are protected. It holds that the insertion of the clause is very significant in the construction of the Act of July 1, 1902. It indicates that, because those who come before are to be governed by the old surveys, those who come after are not to be governed in any particular by the old surveys.

In answer to this we point out that a similar saving clause appears in the general resurvey act of March 3, 1909, 35 Stat., 845, *the presence of which does not of necessity contemplate an abandonment of the old surveys.* See Commissioner's order of January 2, 1913 (Rec., p. 160), which shows that in a resurvey under the Act of March 3, 1909, *supra,* the first effort on the part of the Department is to make, if possible, a retracement of the old surveys. Nor does

there appear to be anything about the ordering of a resurvey generally that contemplates *the entire abandonment* of all of the lines of the old survey and the making of a brand-new survey. In Lane *v.* Darlington, 249 U. S., 330, this court says:

> "Doubts having arisen as to where a portion of the Hancock line on the northern boundary ran, the Department employed one Perrin to make a resurvey. He found and established the original monuments except between Hancock's Stations 20 and 25 and attempted to fix the lines between those also * * *."

Hence it is clearly apparent that the attitude of the Interior Department both toward the old surveys of 1854-7 in retracing the original fourth standard parallel south according to the surveys of 1854-7 and in basing the township lines thereon and correcting the same by an apportioning of the excess among the townships affected, is according to the usual methods. We also point out that the decision of the Circuit Court of Appeals lacks logic, and undoubtedly this lack of logic encouraged the California District Court of Appeal in the case of Kendall v. Bunnell, *supra,* to comment upon rather than follow Cox *v.* Hart, 270 Fed., 51. This lack of logic consists in the holding that the old surveys of 1854-7 were abandoned as to claims initiated *subsequently* to July 1, 1902, but were not abandoned as to claims initiated *prior* to July 1, 1902. This lack of logic is shown more clearly by the decision of the Supreme Court of the State of California in the case of Nichols *v.* McCullom, 169 California, 611, referred to and followed by the Circuit Court of Appeals in Cox v. Hart, *supra* (Rec., p. 226).

This was a conflict between a person claiming a school

section and a person claiming a settlement upon the same land initiated subsequent to July 1, 1902. *The court holds that the old surveys were not abandoned as to the school section, but were abandoned as to any claim initiated after July 1, 1902, under any law.* In order to demonstrate that the school section survived the Act of July 1, 1902, the court says, page 614, that the resurvey under the Act of July 1, 1902, *"in theory at least,"* was to *"reproduce the exact corners and lines of the old"* surveys of 1854-7. Hence to reproduce the school section. That in reproducing the adjoining sections, the school section was naturally *relocated,* not created, because the school section was *"necessarily dependent upon the location of the adjoining sections of public land."* In other words, according to the case of Nichols *v.* McCullom, *supra,* relied upon and followed in Cox v. Hart, *supra,* by the Court of Appeals, it was the duty of the Land Department to reproduce the old surveys in order that all prior existing claims might be protected, but that as to subsequent claims the old surveys had no reference and no application whatsoever, *notwithstanding the fact that under every circular and under all of the regulations no application filed before the Land Department was valid unless the application was described in accordance with the old surveys down to the filing of the plats of resurvey.*

The Supreme Court of California followed Nichols *v.* McCullom, *supra,* in the cases of Miller *v.* Marchus, 171 California, 257; Matter of Scott, 171 California, 263, and Matter of Scott, 182 California, 83, all involving the same problem. The cases of Nichols *v.* McCullom, *supra, et al.,* arrived at precisely the same result as the Interior Department in the case of H. T. Dizney, 41 Land Dec., 257, in which the Interior Department held that the lands were surveyed before, and

continued to be surveyed after, the passage of the Act of July 1, 1902. (We also find that the District Court of Appeal of the Second Appellate District in the case of Kendall *v.* Bunnell, *supra,* arrived at precisely the same result as the Interior Department in the unreported case of the same name while pending before the Interior Department.)

We have not overlooked the fact that in the case of Hart *v.* Cox in the United States Court for the Southern District of California Judge Trippet (Rec., p. 67, at 81 and 82) renders conclusions precisely contrary to that of the Supreme Court of California and, indeed, to the Circuit Court of Appeals, saying that *"the survey of 1856 was an abandoned thing"* and the resurveys were brand new as to every right whatsoever.

Under Cox *v.* Hart, 270 Fed., 51, and Nichols *v.* McCullom, 169 California, 611, the old surveys were not held to be abandoned; *they were merely to be disregarded as to new claims.* In other words, *the lands are both surveyed and are unsurveyed at the same time;* surveyed as to old claims, unsurveyed as to new claims.

It is far more logical to hold that if surveyed for any purpose they are *surveyed.* This is the view of the Interior Department and undoubtedly of the District Court of Appeal in Kendall *v.* Bunnell, *supra.*

C. THE LAND DEPARTMENT'S CONSISTENT RULING THAT THE ACT OF MARCH 28, 1908, SECTION 1, 35 STAT., 52, IS NOT APPLICABLE TO THE IMPERIAL VALLEY BECAUSE AT THE DATE OF THE ACT THERE WERE NO UNSURVEYED LANDS WITHIN THE IMPERIAL VALLEY, HAS MORE THAN A MERELY PERSUASIVE EFFECT. IT IS BINDING UPON THE COURTS.

The courts below have rested their decisions largely on the case of Virgil Patterson, 40 Land Dec., 264. This case, however, is purely anomalous, a beneficent action the Secretary sometimes takes, usually in a purely *ex parte* case. It is far different than the attitude the Department took in adversary cases contemporaneously with the Patterson decision as to actual compliance with the Desert Land Law. See Heflin *v.* Schnare, 40 Land Dec., 261. The Department, however, in the Patterson case, on page 266, specifically says the lands are "*not* strictly unsurveyed lands." Hence a holding that the law relating solely to unsurveyed lands can for beneficent reasons be applied to "*not strictly unsurveyed lands*" is hardly one the courts will accept as competent authority in an adversary case, particularly since the Department has not applied this beneficent rule in an adversary case.

The Land Department has consistently held for years that the Act of March 28, 1908, Section 1, 35 Stat., 52, has never had any operation in the Imperial Valley because at the date it was enacted and thereafter there were no unsurveyed lands therein.

Henderson T. Dizney, 41 Land Dec., 257.
Hart *v.* Cox, 42 Land Dec., 592; 42 Land Dec., 594.
Wilson *v.* Carson, 43 Land Dec., 346.
See also Christopher C. Gingery, 45 Land Dec., 50.

Lands have been generally patented in accordance with this ruling in the Imperial Valley, and this construction has become a rule of property throughout the valley. Even though the Patterson case, *supra*, and certain loose language in various orders and decisions, be regarded as actual ad-

judications to the contrary, the consistent decisions since then are none the less a rule of property. In the case of California *v.* Deseret Water Company, 243 U. S., 420, this court, in adopting the later consistent rule of the Department instead of a former rule, says:

> "It is true that the interpretation of the statute has not been uniform in the Department of the Interior, and it has been otherwise construed in at least one of the Federal courts, Hibbard *v.* Slack, 84 Fed. 571. But the interpretation for which the State insists has been long given to it by the Interior Department. It was more than suggested in Gregg *v.* Colorado, 15 Land Dec., 151, 154, and Rice *v.* California, 24 Land Dec., 14, 15, was adopted upon full consideration in re California, 28 Land Dec., 57, and has been uniformly followed ever since. * * *
>
> "In the brief presented by leave of court on behalf of the United States it is set forth that the rule laid down in re California, 28 Land Dec., *supra,* is still adhered to by the Land Department; that selections aggregating many thousands of acres have been made in reliance upon it, and that no doubt large expenditures of money have been made in good faith upon the selected lands. It is therefore urged that such construction has become a rule of property. In this situation we should be slow to disturb a ruling of the department of the Government to which is committed the administration of public lands (McMichael *v.* Murphy, 197 U. S., 304)."

The Interior Department was compelled to construe the Act of July 1, 1902, *supra,* upon its passage. It obviously could not wait for a court interpretation thereof, as suggested in Kendall *v.* Bunnell, 37 Calif. App. Dec., 125, 128. It

was compelled to construe it upon its passage. The valley presented an emergency. It proceeded to restore the fourth standard parallel south according to the old surveys. In this, if wrong, it were far better that the Interior Department construe the law incorrectly and adhere to that construction than to vary its construction from time to time, leaving claimants and patentees uncertain as to their rights (James *v.* Germania Iron Company, 107 Fed., 597).

We submit that these departmental decisions are binding upon the courts. In arriving at the conclusion that the Imperial Valley was surveyed, the Department had many sources of information not available to an outside tribunal. It has the services and memoranda of men who knew the situation at first hand, field-notes, plats, maps, reports, decisions (reported and *unreported*), public records, and confidential records and other sources that the public or the courts never see. *Its ruling that the land was surveyed from 1902 to 1909 was based upon mixed matters of law and fact, mostly matters of fact.* No outside tribunal would have sufficient material to review these decisions, much less reverse the Department. Hence its decisions are final and binding upon the courts (Gardiner *v.* Bonestell, 180 U. S., 362; Knight *v.* United States Land Association, 142 U. S., 161).

Conclusion.

We therefore respectfully submit that since the land in question was surveyed July 17, 1907, the claim of Ethel Hart based upon the Act of March 28, 1908, Section 1, *supra*, has no foundation, since said law applies to unsurveyed lands only.

III.

Ethel Hart would fail to show a legal right to the land superior to that of Cox even if the lands in question were unsurveyed July 17, 1907, because the Act of March 28, 1908, Section 1, 35 Stat., 52, is not retroactive.

The Act of March 28, 1908, Section 1, 35 Stat., 52, is printed in the introduction. Briefly, it amends the Act of March 3, 1877, *supra*, by prohibiting further filing of applications for unsurveyed lands. As a substitute, and confined to unsurveyed lands only, it permits the initiation of rights under the desert-land law by possession and reclamation by giving such occupant a ninety-day preference right after the filing of the plat of survey.

In the instant case, to afford relief to Ethel Hart, it must not only be shown that the lands were unsurveyed July 17, 1907, see chapter II, but also that the law was retrospective. Ethel Hart must show that acts conferring no rights under the law and of no legal significance at the date when performed in 1905 and 1906, became by the passage of the Act of March 28, 1908, as significant and confer just the same priority as though the Act of March 28, 1908, were in existence in 1905. Nay, more, that the acts of others, which under the law as it existed prior to March 28, 1908, conferred legal priority upon them, are now rendered subsequent in time and the entire legal effect thereof is destroyed.

The District Court and the Circuit Court of Appeals cite for the proposition that Section 1 of the Act of March 28, 1908, 35 Stat., 52, is retroactive, the case of Virgil Patterson, 40 Land Dec., 264. The case does not so hold (as pointed

out in the case of Hart v. Cox, *supra*). "He (Patterson) has had possession of these lands *since May 1, 1908*" (40 Land Dec., 265). In other words, Patterson did not take possession of the lands *until more than a month after the passage of the Act of March 28, 1908;* hence there were no facts calling for a retroactive construction and *no such construction was given.*

The prevailing rulings of the Interior Department, Henderson T. Dimsey, 41 Land Dec., 257; Hart v. Cox, 42 Land Dec., 502, and Wilson v. Carson, 43 Land Dec., 436, are to the effect that the Act of March 28, 1908, *supra*, has no retroactive force and effect.

In the case of Kendall v. Bunnell, 37 Calif. App. Dec., 125, 139, the court holds that the benefit of the Act of March 28, 1908, *supra*, was not available March 8, 1908, because then there was no such act of Congress; hence, according to the prevailing California rule, the law had no retroactive effect.

The case of William Madden v. Nelson Burnham, 196 U. S., 544, fits this situation. The court says, regarding a settlement prior to May 14, 1880 (see Sec. 3 of the Act of May 14, 1880, 21 Stat., 140):

> "*At the time of these transactions, the mere occupation of the land for the purpose at some subsequent time of entering it for a homestead, gave to the party so entering no rights.* The law in force, 12 Stat., 392, made the entry at the Land Office the initial fact * * *. So the law stood until May 14, 1880, 21 Stat., 141, when an act was passed, the third section of which is as follows (quotation of section). *By this section for the first time, the right of a party entering land under the homestead law*

was made to relate back to the time of his settlement. But this act was passed long after the rights of the railroad company had accrued and the legal title had passed to it. *It was not operative, therefore, to divest such legal title or enlarge as against such title any equitable rights which the defendant theretofore had. They must be determined by the law as it stood at the time he made an entry, or at least prior to the time that the title passed to the railroad company.* Now from his own testimony, while he moved on the land in October, 1866, he made no application to enter it until after the lands had been withdrawn. It is true that he claims he had permission from the Register and Receiver of the Land Office to go upon the land and occupy it, but the register had no power to give such permission; he had no general control over the unappropriated public lands; he could vest no rights legal or equitable, in any individual other than such as are authorized by statute. His authority was limited to receiving and acting upon applications for homestead or preemption entry, and, it cannot be that any such unauthorized permission of a local land officer can create a right not given by the statute, or defeat a title conveyed by the Government in full compliance with the law. This is not like the case just decided (*Ard v. Brandon*), in which the local land officer refused to receive an application which he ought to have received; neither is it one in which such officer failed to do anything which he ought to have done. No application was made for an entry. The excuse tendered is that the father-in-law and the son-in-law had but $10 between them and $20 was the amount necessary for the entry of the two homesteads; but unfortunate as the defendant's situation then was, much as he may be entitled to sympathy, it cannot be that when he fails, even by reason of

his poverty, to do that which the law prescribes as the initiation of any rights to the land he is nevertheless entitled to the same protection which he would have received had he complied with the statute. *Leniently as the conduct of a settler is always regarded by the courts, it cannot be that such leniency will tolerate the omission by him of any of the substantial requirements of the statute in respect to the creation of rights in the public lands.*" (Italics ours).

In the case of United States *v.* the Schooner *Peggy*, 1 Cranch, 103, the Chief Justice says that the courts "will *struggle hard against* a construction of a law that by a retrospective operation will affect the rights of parties." (Italics ours.)

In the case of City Railway Company *v.* Citizens Railroad, 166 U. S., 557, at 565, this court refused to give a retrospective interpretation to a statute, saying that there is always a *presumption that the Legislature intends statutes to operate prospectively only*.

In the case of Shreveport *v.* Cole, 129 U. S., 36, at 42, this court, in refusing to give a retrospective construction to a statute, said that it is only when a retrospective construction is *manifest beyond any reasonable question* that the court will impose such a construction.

In United States *v.* Heth, 3 Cranch, 399, Mr. Justice Jackson says that a retrospective construction will never be given to a statute "unless they (the words) are so clear, strong and imperative *that no other meaning can be annexed* to them or unless the intention of the Legislature *cannot otherwise be satisfied.*" (Italics ours.)

In the following cases a retrospective construction was denied:

Le Bois *v.* Bramell, 4 How., 449;
Murray *v.* Gibson, 15 How., 421, 423;
Auffmordt *v.* Rasin, 102 U. S., 620;
White *v.* United States, 191 U. S., 545, 552;
Cameron *v.* United States, 231 U. S., 710, 720;
Union Pacific Ry. Co. *v.* Laramie, 231 U. S., 190, 199,
And in particular *Union Pacific v. Snow,* 231 U. S., 205.

As stated by this court of a similar statute:

> "Its language was *not* of *confirmation* of rights but was *permissive* and *prospective* and *related to the initiation and acquisition of rights* by a different class." United States *v.* Hemmer, 241 U. S., 379, 386. (Italics ours.)

Whether the said Act of March 28, 1908, Section 1, *supra,* is retroactive depends upon construction thereof not found in the words used. The opening sentence of Section 1 reads: *"That from and after the passage of this Act."* We submit that all that was intended was to amend the desert-land law so as to obviate difficulties of recording unsurveyed claims, always a fruitful source of difficulty (F. A. Hyde, 40 Land Dec., 284; West *v.* Rutledge Timber Company, 244 U. S., 90). Prior to March 28, 1908, there was no class of persons occupying desert lands who could not validate their occupancy except by a new remedial act. All they had to do, if there were such occupants, was to file an application. Hence the law is not even remedial.

We therefore respectfully submit that Ethel Hart has no rights whatsoever under the Act of March 28, 1908, Section 1, *supra*, as the acts relied upon by her all occurred *prior* to the passage of the law.

IV.

Tract No. 113 was public land subject to entry by a desert-land application July 17, 1907.

Since Ethel Hart had initiated no right to the land under any public land law (Chapters I, II, and III) the land was on July 17, 1907, public land of the United States (Tuolumne Company *v.* Maier, 66 Pacific, 863).

She had no authority to take possession of 320 acres of public desert lands prior to filing of an application (prior to March 28, 1908) (T. C. Power and Brother, 33 Land Dec., 152, 153).

She had no authority to take possession of 320 acres of public land under the settlement laws prior to the enlarged homestead act of August 9, 1912 (37 Stat., 267); Cate *v.* Northern Pacific, 41 Land Dec., 316, 318, and no authority after that date except by actual residence thereon (C. C. Jensen, 42 Land Dec., 159).

The land was "unappropriated" public land subject to homestead entry under R. S., 2289. In Wheeler *v.* Rodgers, 28 Land Dec., 250, the land prior to and at the date of Rodgers' entry was improved land, enclosed with a board fence eight feet high and other buildings constructed, with a half-mile track for use by the County Agricultural Association in its annual fair. The Department allowed the homestead entry, holding that since the land was not claimed

under the provisions of a public-land law it was unappropriated land legally.

In Hall *v.* Armann, 41 Land Dec., 230, a settlement right under the Act of May 14, 1880; 21 Stat., 140, was attempted to be maintained by constructive residence—that is, by erecting improvements thereon and looking after the cultivation thereof, *but by being continually absent therefrom.* The Interior Department held that this did not constitute a *withdrawal* or a legal appropriation of the land so that another could not establish a valid settlement thereon and obtain full rights under the homestead law.

The land was "vacant" land and an application therefor under the Act of June 4, 1897; 30 *Stat.,* 36, *would have been valid.* In Hall *v.* California Land Company, 41 Land Dec., 647, a forest-lieu selection under the Act of June 4, 1897; 30 Stat., 36, was made for certain lands. Under the Act "vacant" lands only could be selected. Hall filed a protest against the selection, alleging that the lands were not vacant, but that they were occupied by himself. He had thereon certain buildings that he had erected some time before while claiming the land under the homestead law. It appeared that his homestead application had been canceled prior to the forest-lieu selection thereof, and he did not show any settlement at the date of the selection. The Department pointed out that the tract books of the General Land Office would show that Hall had no title to the land, and the fact that there were abandoned cabins or improvements upon the land erected by someone having no present claim to the land under a public land law was no showing that the lands were not "vacant." Hence it follows lands are "vacant" unless the alleged occupancy is a *legal* occupancy.

The word *"vacant,"* or *"unappropriated,"* appears in many of the land laws of the United States. These amplifying words *do not appear* in the Desert Land acts of March 3, 1877, Section 1, *supra;* of March 3, 1891, Section 2, *supra,* nor even of March 28, 1908, Section 1, *supra.* Nor has there been any trend of decisions holding that the law has such an effect.

Alleged prior occupancy is no bar to a subsequent desert-land application.

Kendall *v.* Bunnell, 37 Calif. App. Dec., 125.
Hart *v.* Cox, 42 Land Dec., 592.
Oren *v.* Peterson, 11 Copp's Land Owner, 221.
Selway *v.* Flynn, 6 Land Dec., 541.
Roumagoux *v.* Erickson, 45 Land Dec., 315.

Cox did not enter home land of Ethel Hart in trespass. In Atherton *v.* Fowler, 96 U. S., 513, a land grant was held void, and certain persons rushed for the said lands to acquire pre-emption settlement rights thereon. Part of the lands were already occupied, some perhaps by persons not legally capable of compliance with the pre-emption laws. They had houses, barns, fences, orchards, cultivated fields, which occupancy was supposedly not respected by the intending settlers, who broke down fences and took possession of the cultivated lands, the orchards, the barns, and even the homes, and turned the occupants out. This court said that even if the prior occupants had no right under the pre-emption laws, that the settlement rights could not be initiated by violent trespass upon home lands of others, hence such violent acts gained no rights.

See also Denee *v.* Ankeny, 246 U. S., 208, restoring possession to an occupant of fenced and cultivated lands for twenty

years, where an alleged settlement was a violent trespass committed at night by breaking down a fence.

Cox, if he were a violent man by nature, could have found nothing on tract No. 113 to commit a trespass upon—no house, barn, orchards, cultivated fields, fences, or the like. Ethel Hart lived elsewhere. There were only plow furrows, an abandoned four-acre plot that had been planted to barley, unwatered and returned to its desert condition, and a few stakes. He entered in broad daylight upon a tract actually still in a state of nature. Miss Hart's improvements upon tracts No. 114 and the S. ½ of 115 were never disturbed or claimed by Cox.

Repeating the quotation from Shepley *v.* Cowan, 91 U. S., 330,

> "In all such cases (conflicts between claimants), the first in time, in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right,"

we assert that to be first in right means first legally.

The mere fact that of two claimants competing for the same lands one is first on the ground does not mean that the courts and the Department cannot determine which is first in right. Frequently the award is to the one second on the ground but first to comply with the law. Congress encourages vigilance and compliance in the one first on the ground, not laxness and absolute confidence of security.

Under the Act of May 14, 1880, Section 2, 21 Stat., 140, contests have been successfully waged against homestead entrymen, and under the Act of March 3, 1891, 26 Stat., 1095, Section 2, against desert-land entrymen, which frequently resulted in the award to the contestant of the im-

proved and occupied lands of the contestee (Lee *v.* Johnson, 116 U. S., 48).

The Act of May 14, 1880, Section 3, 21 Stat., 140, awards to the first settler a preference right to make an application for the land he is occupying of three months after the date of survey or, if the land is already surveyed, three months after the date of settlement. It does not matter how much he may improve, cultivate, and occupy his land if he fails to file his application within the three months' period, a subsequent adverse settler by filing an application ahead of him obtains legal priority to the land (Svor *v.* Morris, 227 U. S., 524, 528).

Ethel Hart's excuse for not legally initiating a claim was that her alleged conversation with the register in February, 1906, was an acceptable substitute for her compliance with the law. In the case of Maddox *v.* Burnham, 156 U. S., 544, this court says that such officers can only receive applications and do what the law authorizes them and cannot bind the United States otherwise. Far less excuse is shown by Ethel Hart for the failure to file an application necessary to initiate rights than was shown in the case of Maddox *v.* Burnham, since Ethel Hart cannot claim it was poverty. In that same case there was a prior occupancy, but no actual filing as required by the law, because, through poverty, he had not the money for filing fees. This court declined to give the settler the land.

> *"Leniently as the conduct of a settler is always regarded by the courts, it cannot be that such leniency will tolerate the omission by him of any of the substantial requirements of the statute in respect to the creation of rights in the public lands"* (Maddox *v.* Burnham, 156 U. S., 544).

In the case of Missionary Society *v.* Dalles, 17 Otto, 330, this court says regarding the claim of a prior occupant:

> "But no steps, as we have seen, were taken by appellant to establish its claim under those regulations. It simply settled upon the public domain as a tenant by sufferance, without authority of law or regulation of any Government, and had done no act by which it could acquire a claim of title."

The same rule has been frequently applied in various phases in this court, that something more than being first on the ground is essential and does not establish priority of right to the land unless accompanied by a compliance with the public-land laws of the United States.

Shepley *v.* Cowan, 91 U. S., 330.
Deffaback *v.* Hawk, 115 U. S., 392.
Sparks *v.* Pierce, 115 U. S., 408.
Bohall *v.* Dilla, 114 U. S., 47.
Cole *v.* Ralph, 252 U. S., 286, 301.
Gauthier *v.* Morrison, 232 U. S., 452.
Belk *v.* Meagher, 104 U. S., 279, 287.

See also the following departmental cases:

Banks *v.* Smith, 2 Land Dec., 44.
Molyneaux *v.* Young, 7 Copp's Land Owner, 107.
Powers *v.* Forbes, 7 Copp's Land Owner, 149.
Nickalls *v.* Burbank, 8 Copp's Land Owner, 57.
Marks *v.* Bray, 1 Land Dec., 423.
Ward *v.* Williams, 1 Land Dec., 417.
Opinion, 9 Copp's Land Owner, 214.
In re McKittrick, 2 Land Dec., 638.
Circular of April 5, 1883, 2 Land Dec., 640.

Bell *v.* Ward, 4 Land Dec., 139.
Walker *v.* Snider, 4 Land Dec., 387.
Stoddard *v.* Neigel, 7 Land Dec., 340.
Crane *v.* Stone, 10 Land Dec., 216.
McDonald *v.* Jaramilla, 10 Land Dec., 276.
Farris *v.* Mitchell, 11 Land Dec., 300.
Stovall *v.* Herman, 12 Land Dec., 382.
Jones *v.* Kirby, 13 Land Dec., 702.
Shepard *v.* Meyer, 27 Land Dec., 569.
Thompson *v.* Holroyd, 29 Land Dec., 362.

"Neither settlement, improvement, payment of consideration, nor any other act *not in pursuance of an act of Congress authorizing the disposal of land sought to be appropriated, gives any right to the applicant or claimant.*" (Italics ours.) (T. H. Bartlett, 32 Land Dec., 374, 376.)

The case of T. H. Bartlett, *supra,* was cited and followed by the Secretary of the Interior in the fairly recent case of Roumagoux *v.* Erickson, 45 Land Dec., 315. This was a conflict between Roumagoux, who had filed an application for the land under the *Desert Land Act,* and Erickson, who had filed a prior application for the land under the Soldiers' Additional Act, a scrip act which would not take occupied land. The land, occupied by improvements not in accord with a land law, was awarded to Houmagoux under his desert-land entry.

We therefore respectfully submit that because Ethel Hart manifested the first desire to secure this land does not vest her with legal priority or prevent others, including Cox, from acquiring the legal preference thereto.

CONCLUSION.

Ethel Hart asks that Cox's patent be charged with an equity in her favor because of her being first on the ground. To secure a decree, she must show that she was not only first, but did those acts which, under the law, constituted legal priority. Further, to secure the decree, she must show that the patent which issued to Cox should have been issued to herself. Since she has failed to do this, her attack on the departmental ruling is futile:

Bohall *v.* Dilla, 114 U. S., 47.
Sparks *v.* Pierce, 115 U. S., 408.
Johnson *v.* Riddle, 240 U. S., 467, 481.
Kirk *v.* Olsen, 245 U. S., 217.

All she shows, *prior to Cox's application of July 17, 1907,* is that while she was a minor she *could not,* and that after she became of age she *did not,* initiate a right to the land.

Respectfully submitted,

CHARLES R. PIERCE,
JOHN M. SUTTON,
Attorneys for Appellant.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 71.

JOSEPH W. COX, APPELLANT,

vs.

ETHEL HART, APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

SHORT RESPONSE FOR APPELLANT.

This response is filed for the sole reason that we fear the appellees have somewhat diffused the facts and issues in the case as it is now pending before this court; further, the appellees have not correctly stated our argument in the matter of the surveys.

Before the Interior Department, in the case of Hart *vs.* Cox, 42 Land Dec., 596, before the District Court for the Southern District of California (Rec., p. 82) and before the Circuit Court of Appeals for the Ninth Circuit (Rec., p. 226), 270 Fed., 51, the sole question was whether Miss Ethel Hart, the plaintiff in the court below and the appellee here, or whether Joseph W. Cox, the defendant in the court below and the appellant here, *was first in time in initiating a right to Tract No. 113*, under the provisions of the Desert land Act of March 3, 1877, 19 Stat., 377, Section 2 of the Act of

March 3, 1891, 26 Stat., 1097, and Section 1 of the Act of March 28, 1908, 35 Stat., 52. *No other question was even discussed* by the Secretary of the Interior, by the United States Court for the Southern District of California and by the Circuit Court of Appeals for the Ninth Circuit. Much as we would like to answer the somewhat lengthy discussion in the "reply brief" of the appellees, we can not do so within reasonable limits and if we did so, we would be discussing matters not in point. As we read the brief for the appellees, the bulk of the argument therein is not directed to the question of priority upon which alone Miss Hart must win or lose, but was for the purpose of "exciting the surmise" of the court as to whether or not, granted that Miss Hart was not actually prior in time, she has not otherwise complied with the law.

This matter is not involved now. It may or may not be involved at some new trial of the case. It would merely be taking the time of the court with no profit to answer the facts alleged by Miss Hart now. We therefore rest our case upon the points of law discussed by the Interior Department in its adjudication of this case, 42 Land Dec., 596, which points were sharply met and oppositely decided in the lower courts. These relate solely to priority. At another time and in another tribunal other points may be involved but they are not properly before the court at this time.

The Imperial Valley Has Been Surveyed From 1854-7 Down To the Present Time.

The reason why it is necessary to discuss the problem whether or not the Imperial Valley was surveyed or unsurveyed in 1905, 1906, and 1907, is that Section 1 of the Act of March 28, 1908, 35 Stat., 52, reprinted on page 3, of the Appeal Brief, applies only to *unsurveyed* lands.

If then the lands, during these years were *surveyed* and *not unsurveyed* the Act of March 28, 1908, can have no operation within this area and upon the lands involved.

It is true that in Kendall *vs.* Bunnell, 37 California App. Dec., 125, the court held that it was unnecessary to decide whether, prior to March 28, 1908, the lands within the Imperial Valley were unsurveyed because Section 1 of the Act of March 28, 1908, *supra, has no retrospective force or operation*; hence said Act of March 28, 1908, *supra*, would have no operation even prior to March 28, 1908, if the land were unsurveyed.

However, we believe that the Land Department was absolutely correct in its rulings that the Imperial Valley since 1854-7 has never been unsurveyed.

Public lands of the United States are either surveyed or are unsurveyed. They can not be both. There is a certain point of time when lands cease to be legally unsurveyed and become legally surveyed.

In United States *vs.* Morrison, 240 U. S., 192, lands were surveyed upon the ground but, because of a long inspection and investigation, the survey was not finally approved and the plats were not finally filed for a very considerable period of time. In the meantime a forest reserve was created over part of the area, including section 16. In the proclamation creating the forest reserve, the township was included within the diagram and showed the township as fully surveyed. Section 16 upon the ground had been long fully identified by the surveyors. This court, however, held that until the plat of the survey was officially approved, and filed, that the lands were unsurveyed. We have noted that in the Morrison case, *supra*, section 16 was run out upon the ground prior to the approval and filing of the plat. It was as easily capable of indentification

before the plats were filed as afterwards. Yet the land was *legally* unsurveyed.

Along a township line separating a surveyed area from an unsurveyed area, it is a simple matter for an ordinary surveyor to identify subdivisions in the unsurveyed belt along the township line and to give them the description they will receive upon the survey of the land. Nevertheless, such ease of identification does not make the land surveyed. See United States *vs.* Montana Lumber Company, 196 U. S., 573.

Upon the other hand, alleged errors of the original survey and the loss and obliteration of the corners do not make the lands *legally* unsurveyed after they have once been *legally* surveyed. See Stoneroad *vs.* Stoneroad, 158 U. S., 240; Gardiner *vs.* Bonestell, 180 U. S., 369, and Knight *vs.* Land Association, 142 U. S., 161. Nor can a survey in any manner be collaterally attacked. See Whitaker *vs.* McBride, 197 U. S., 510, and Gleason *vs.* White, 199 U. S., 54.

As a practical matter, unsurveyed lands are in a far different legal situation than surveyed lands. There are few laws which permit the appropriation of unsurveyed lands by the filing of applications. These involve grave difficulties of recordation in the Land Department because the Land Department's records are not suited to recording lands other than those officially surveyed according to the ordinary township and section system of surveys. When lands become surveyed, the triplicate of the original plat, one of the most important documents of public land practice, is sent to the local Land Office. From this plat a tract book is made up by townships with each section and subdivision having a space opposite for notations. When an application is presented or an entry is made, it is noted upon the original triplicate plat and also upon the tract books opposite the subdivision applied

for or entered. There are very few laws and very few grants that operate upon or take effect upon unsurveyed land, but practically all of the grants and all of the laws operate upon surveyed lands.

Hence it will be seen, as pointed out in the Morrison case, *supra*, the difference between surveyed land and unsurveyed land is not a question of identification. It is a question of law. Indeed, many cases may be pointed out where the land could readily have been identified, yet the land was not surveyed; while in large numbers of cases that have come before the courts there are great difficulties of *identification* notwithstanding the fact that the lands are *surveyed*.

In the administration of the surveys of the Land Department as pointed out on page 19 of the Appeal Brief, where there has been a loss or obliteration of corners, notwithstanding these corners are stated to be "unchangeable," instructions have been issued for the restoration of these lost and obliterated corners by county surveyors and even by private surveyors. The mere fact that certain corners have been lost does not make the lands the unsurveyed legally.

Within the Imperial Valley the Land Department faced a situation where there was a wide-spread loss and obliteration of corners. This is not the first time that this has happened and the remedy is *not the annulment of the plats, but the remedy is resurvey*.

If, prior to 1902, Congress had passed the General Resurvey Act of March 3, 1909, 35 Stat., 845, it would have been absolutely unnecessary for Congress to have passed the special act of July 1, 1902, 32 Stat., 728.

The appellees have greatly misconceived our argument. They claim because of the quotation from certain statements, official and unofficial, that there was a wide-spread loss and obliteration of corners within the Imperial Valley, that this means that the lands were

legally unsurveyed. Far from it. The lands being once surveyed, as pointed out in the case of H. H. Peterson, 40 Land Dec., 562, 564, a grant to the State of California of sections 16 and 36 became fixed.

The Land Department could not ignore this grant to the State of California, it could not go ahead and annual the plats. The lands once having been granted, any effort upon the part of the United States to allow entries or to grant the same lands to others would have been nullities. In order not to bring its own administration into comtempt, it was essential that the Land Department take the burden of locating these granted school sections.

Nor is it of the utmost importance that the court be informed as to what the certain officials of the department *said* at various times. Through a changing set of officials, each having an imperfect knowledge of the situation and burdened with other duties, it is not surprising that much loose language appears in many of the decisions. What the department *did* is all important. As we have pointed out.

A. There was no cancellation of the old 1854-1857 survey plats or tract books.

B. Entries continued to be made in accordance with these plats and tract books down to the filing of the resurvey plats (Rec., p. 129); 45 Land Dec., 50, 51; 40 Land Dec., 562, 570.

C. The 1854-7 surveys were genuine. See Appeal Brief, p. 18. This is admitted by our opponents.

D. The erroneous private retracements, which were neither indicative of the 1856 surveys nor of the resurveys to be made, were the cause of the act of 1902. See Appeal Brief, p. 19; see (Rec., p. 128.)

E. The first step in the resurvey of the Imperial Valley after the act of 1902, was the adoption of the Fourth Standard Parallel, South. See Appeal Brief, p.

20. The important fact regarding this Fourth Standard Parallel South is that the reestablishment thereof *was adopted as official* by the Land Department, not that in the *opinion* of certain other officials or persons, the said Parallel was not correctly established.

F. The resurveys of the townships were based upon this reestablished Fourth Standard Parallel South. See 40 Land Dec., 562. Whether this practice was good or bad in the opinion of other officials or in the opinion of other critics is immaterial, the fact is the department adopted it and stuck to it.

G. The resurveys were conducted according to the ordinary survey and resurvey manual (Rec., p. 133).

H. The department now knows the locations of the old surveys. C. C. Gingery, 45 Land Dec., 50, 51.

I. Under the claims jurisdiction from 1902, to September 13, 1904, there was no different procedure within the Imperial Valley than in any other surveyed area (Rec., p. 139).

J. From September 13, 1904, to March 31, 1906, there was no different procedure in the Imperial Valley than elsewhere *except that no final papers were issued* (Rec., p. 139).

K. From March 31, 1906, to May 24, 1907, applications could be received and placed of record but the local land officers were not permitted to allow entries of any nature. There was no cancellation of the plats (Rec., p. 139).

L. From May 24, 1907, to the filing of the plats of resurvey of January and February, 1909, desert land entries were allowed but all applications subsequent to March 31, 1906, "must describe the land with reference to the established lines of the original survey" (Rec., p. 141).

For the first time in any document is there any suggestion of even the term "unsurveyed lands" and

this appears in the said circular of May 24, 1907. We characterize the use of this expression as loose language for the following reason. The circular of June 19, 1906, (Rec., p. 137) instructed the local land officers to receive all sorts of applications but to allow no applications to pass to entry. This was believed to be a hardship upon honest claimants and a license to dishonest claimants. As the Imperial Valley was an ideal situation for the Desert Land Law, it was conceived that entries under the Desert Land Law should be allowed. Thereupon in a bungling and almost meaningless language the department says that entries to desert lands should be allowed *"the same as though the lands were unsurveyed"* (Rec., p. 141). It did *not* say *"because* the lands were unsurveyed" but that the entry should be allowed "the same *as though* the lands were unsurveyed." It is upon *this* and similar bungling expressions that appellees have endeavored to claim that between 1902 and 1909, the area of the Imperial Valley was *unsurveyed*. Such bungling expressions even went so far as to state that the lands "while not strictly unsurveyed" nevertheless "occupied the status of unsurveyed lands." 40 L. D., 264. Such loose *expressions* can not control. It is the *action* of the Land Department and the legal effect of such actions.

Furthermore, this has been the administration of the Land Department from the outset to hold that the Imperial Valley was surveyed. The change of this ruling would upset titles to an alarming extent within the Imperial Valley. Even if the decisions of the department were wrong, *persons have accustomed themselves to this decision*, titles have passed in accordance therewith and the upsetting of the matter would stir up great hardship and difficulty. James *vs.* Germania Iron Co., 107 Fed., 597.

Upon another point we wish to emphasize. There

is before the court in this case a record of 240 pages, a small portion of which is information in regard to the surveys. Within the files of the Land Department are plats of the old and the new surveys, the field notes of the old and the new surveys, complete reports from the first settlements within the Imperial Valley in 1900; one special agent alone reporting upon over five hundred complications. The great bulk of this information, including facts regarding the location of the lines of the 1856 surveys, and of the Fourth Standard Parallel South are not before the court in this case and will probably never be before the court in any case. Such questions of mixed fact and law regarding surveys are matters which this court has frequently stated can not be reviewed and that the decision of the department based thereon as in Cox *vs.* Hart, 42 L. D., 596, must be final. See Gardiner *vs.* Bonestell, 180 U. S., 369.

Very respectfully,

CHARLES R. PIERCE,
JOHN M. SUTTON,
Attorneys for Appellant.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 71.

JOSEPH W. COX, APPELLANT,

vs.

ETHEL HART, APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR APPELLEE.

Prefatory: The body of lands, above 800 square miles in area, authorized to be resurveyed by the Act of Congress of July 1, 1902 (32 Stats., p. 728), and in which the tract in controversy here is situated, has been officially styled "the Imperial Valley, California" (case of Salisbury, 39 L. D., 472), and will be referred to by that name usually in this argument. As shown by the terms of that statute said lands were then situated in San Diego County, California; they

were included in Imperial County upon its organization out of the eastern part of San Diego County in the year 1907 (Kerr's Political Code of Cal., ed. of 1920, p. 1503, sec. 3921).

The parent statute of Congress relating to the disposal of the desert lands of the United States for reclamation by individual enterprise was the Act of March 3, 1877 (19 Stats. at Large, p. 377). It was supplemented by the Act of March 3, 1891 (26 Stats., pp. 1096-7), adding several sections to the first act, and by the Act of March 28, 1908 (35 Stats., p. 52). Those acts and that of July 1, 1902 (32 Stats., p. 728), above mentioned, are the statutes of chief interest in the present case.

We acknowledge with regret the diffuseness of the present brief, and will not aggravate that fault by attempting explanatory apologies.

The use of *italics* in this brief is in general the device of counsel for the appellee.

Statement of the Case.

The statements of fact in the opening brief for appellant here are, doubtless by inadvertence, often inaccurate. Hence the constraint we are under to show at the start some of the more prominent general features of the case and to follow such exhibit with an outline of the probative facts.

Cox, the defendant below, appeals from a decree of the Circuit Court of Appeals for the Ninth Circuit which affirmed a decree of the U. S. District Court for the Southern District of California adjudging that the legal title to a certain described tract of land in said Imperial County (tract No. 113 in twp. 14 S., range 15 E., San Bernardino B. & M., which

was desert land of the United States before its reclamation by the efforts of the plaintiff) is held by the defendant in trust for the plaintiff and requiring him to execute a conveyance thereof to her (Record, pp. 65-66, 227). The suit is brought to control the patent for said land issued by the United States to Cox October 24, 1918, and is of the nature illustrated by such cases as Moore *vs.* Robbins, 96 U. S., 530, 535-6; Duluth, etc., R. R. Co. *vs.* Roy, 173 U. S., 587; Daniels *vs.* Johnston, 237 U. S., 568, 569, and many others, and proceeds on the general ground that in holding Cox to be entitled to enter said tract and receive a patent therefor from the Government the Honorable Assistant Secretary of the Interior, who rendered the decision, mistook the law. That such mistake occurred was the conclusion of both the courts below.

It was the design of Congress in the legislation relating to the desert lands to authorize the sale thereof in limited parcels to *persons who actually reclaim, irrigate* and *cultivate* the same; such policy has been judicially described as follows:

> "It was the manifest purpose of Congress to hold out to the citizens of the United States an inducement to reclaim the waste and desert lands of the public domain, and thus render them subservient to the uses of husbandry by process of irrigation."
>
> United States *vs.* Mackintosh, 29 C. C. A., 176; 85 Fed. Rep., 333.
>
> Approved in Connor *vs.* United States (C. C. A., 9th Circuit), 214 Fed. Rep., 535.

"Desert lands are not offered to settlers for speculation, nor what money they will bring to the Government, but they are offered to settlement by Congress

> in the exercise of authority to provide for the common welfare, and in the discharge of a duty to develop the agricultural resources of the United States."
>
> Chaplin *vs.* United States, 114 C. C. A., 93; 193 Fed. Rep., 881-82.

> "The central idea of the whole policy of the Government in dealing with these arid lands was to secure their reclamation upon moderate terms for the benefit of the country."
>
> Phillips *vs.* Carter, 135 Cal., 604, 608.

How, in this case, such intent of the said statutes miscarried, and how Cox, the appellant, by the holding of the Department that he, and not the appellee, should receive a patent for said land, was permitted to reap where he had not sown, is apparent from the following sententious passage in the record of the trial in the District Court:

> "It appeared, without conflict, from the evidence that the defendant did not, at any time, conduct any water upon any part of said tract 113 [the land in dispute]; that he did not, at any time, irrigate or cultivate any part thereof, or, at any time, plant, raise, or produce any crop or crops of any kind thereon" (Record, p. 102).

One or two further matters important in other connections, but incidentally illustrative of the same question, to wit, which of the contending parties has fulfilled the intent of the said legislation of Congress, are these (we state the established facts of the record): That plaintiff, being in the actual possession of a tract of 320 acres of desert land, which included the said tract 113 here in dispute, "was proceed-

ing," as declared by the Supreme Court of California, in her action to recover possession from Cox, "in the usual and ordinary manner to subjugate and cultivate the tract which she had caused to be marked out" (Hart *vs.* Cox, 171 Cal., 368); that while she was such occupant her possession was invaded by the defendant (Record, pp. 70, 105, 172), and he maintained his intrusion thereon until, as the result of the action against him by the plaintiff in the courts of the State, he was expelled from the land by the sheriff of the county (Record, pp. 105-6), whereupon "the plaintiff again took possession of the land *and completed the reclamation thereof*" (Record, p. 126). Such were the net results; that plaintiff *reclaimed* from its desert state the land in dispute and the whole of it; the defendant never reclaimed the land or any part of it.

> "It appeared from the evidence on the trial of this cause, and it was admitted by the defendant, that the only work of any sort done by defendant on said tract No. 113 was such work as he had done thereon, as herein stated, prior to March 15, 1909, the date on which he was ejected therefrom by the sheriff" (Record, p. 116).

That work was all done subsequent to and during his trespass upon the possession of the plaintiff (Record, pp. 105-6), and that work, such as it was, did not result in the *conduct of any water upon, or the irrigation or cultivation of,* any part of the land (Record, p. 102).

We do not claim that those things are necessarily determinative of the controversy, but we do claim that they may justly excite the surmise that the action of the Land Department in holding Cox to be entitled to a patent for

this land *was a clear miscarriage of justice*—a surmise that upon examination will be found, we respectfully maintain, to ripen into conviction.

The main grounds for relief on which the plaintiff's bill proceeds may be condensed as follows:

(1) That the land in question, and the plaintiff as the possessor thereof, were within the proviso of section 1 of the Act of March 28, 1908 (35 Stats., p. 52). That is to say, at and prior to the time of the passage of that act the plaintiff had "taken possession of a tract of unsurveyed desert land not exceeding in area 320 acres," including the tract of 160 acres now in dispute, and had reclaimed a part of it, and had "in good faith commenced the work of reclaiming" the whole of it, and hence had "the preference right to make entry of such tract under" the desert-land acts.

(2) That plaintiff about February, 1906, took actual possession of said tract of desert lands, including the 160 acres the subject of this suit, now called tract 113, according to the resurvey of the Imperial Valley authorized by Congress (Act of July 1, 1902, 32 Stats., p. 728), and was proceeding in good faith to reclaim the same in accordance with the law, and that while she was so proceeding the defendant intruded upon her possession, and whatever steps he took to enter the land were taken in violation of her possession and right of occupancy—vindicated by her in an action in the courts of the State, as above intimated—and that he acquired no rights which the Land Office could lawfully

recognize, because contrary to the standing rule of the Land Office and to the principle declared in Atherton *vs.* Fowler, 96 U. S., 513, and numerous other cases.

(3) That plaintiff did the things, so far as she was permitted by the action of the land officers, necessary to entitle her to enter the land, according to the acts of Congress and the regulations of the Land Department: that she reclaimed the land, and that the defendant did not.

(4) That the defendant, by false and fraudulent testimony in his final proof, induced the officials of the Land Department to believe that he had irrigated the land, reclaimed and produced crops on it—contrary to the truth.

(5) That the award of the land to Cox arose from misconception of the law by the officials charged with its administration, more especially the local Register and Receiver and the Secretary of the Interior, for the intermediate decision of the Commissioner, reversing that of the Register and Receiver, was in plaintiff's favor (Record, pp. 3-41).

The evidence at the trial in the District Court is brought up in a statement settled by the judge under Rule 75 (Record, pp. 84-209). In both courts below the decision turned mainly on the proviso in section 1 of the Act of March 28, 1908 (35 Stats., p. 52); they held that it applied to the lands in question, and that under it Miss Hart, the plaintiff, had "a preference right" to enter the land after the resurvey authorized by Congress July 1, 1902 (32 Stats., p. 728), had been completed (Record, pp. 225-26). Neither the district judge nor the Circuit Court of Appeals thought it necessary to discuss at length the other grounds of plaintiff's bill; but the former followed his opinion on the subject of the effect

of said Act of March 28, 1908, with the further statement that

> "I also think that the claim of the plaintiff that she was prior in time as to application for the land, has merit, but it does not seem necessary to discuss that question" (Record, p. 83).

Both courts, however, in holding plaintiff entitled to said "preference right" necessarily determined that her possession of the land and her commencement of the reclamation thereof *were prior and superior to any acts of Cox* directed to the acquisition of title. See the opinion of Judge Gilbert in the Circuit Court of Appeals (Record, pp. 225-6).

The foregoing outline will tend, we hope, to make easier of apprehension some further details. There is virtually no conflict in the material evidence.

A summary of it is contained in the decision of the Commissioner of the General Land Office rendered December 7, 1912, in favor of the plaintiff and against the defendant. Such decision, although afterwards reversed by the Secretary of the Interior, was adopted into the opinion of the District Court below (Record, pp. 68-79); and from it, aided by some references to other parts of the record, we draw the following particulars to supplement the above outline:

The plat of the resurveyed township containing the parcel of land in dispute was filed in the local Land Office February 23, 1909 (Record, pp. 21, 181), such township being designated as "Resurveyed township No. 14 south, range No. 15 east, San Bernardino Meridian, California," a copy of it appears at page 136 of the record. The 160-acre parcel here

in question is there denoted as "Tract 113," immediately west of and adjacent to tract 114 and the south half of tract 115.

On January 30, 1906, plaintiff reached her majority and immediately thereafter she began the reclamation of the 320-acre tract which had been previously marked out by a plowed ditch or furrow around the same, including the 160 acres (Tract 113 of the subsequent resurvey) in controversy, and within a few months she had reclaimed 80 acres in the southeast part of said 320-acre tract and lying immediately east of the 160 in dispute. She leveled such 80, constructed ditches for irrigating it, brought water upon the same, cultivated it, fenced it to keep animals *in*, apparently (Record, p. 164), and then and thereafter regularly cultivated it and took the crops. The southeast corner of that 80 is the highest point in the whole tract of 320 acres, and the work of reclamation in that neighborhood was usually inaugurated at the highest point of a tract, so that the water might be most conveniently distributed (Record, pp. 7, 8, 70, 104, and elsewhere). Also, in February and March, 1906, the plaintiff planted to barley and irrigated 5 acres (defendant admits 3, Record, p. 45) on the southeast 40 of the 160 acres now in controversy; this small piece was neglected and did not produce a crop that year (Record, p. 70). The assertions in appellant's brief (pp. 8, 45) that she abandoned it are without support in the record, and contrary to the evidence (Rec., pp. 70, 76, 105, 124-5-6). At the same time that plaintiff commenced the work of reclamation, as above stated, in February, 1906, she caused a disc harrow to be run around the entire tract of 320 acres, thus further marking the exterior boundaries thereof (Record, p. 104).

November 3, 1906, plaintiff set stakes for the purpose of marking out a head ditch on and along the east line of the 160 acres in suit, and also marked out lines for "borders"* to be constructed upon that tract. And she caused furrows to be plowed on two sides of such tract, along the east line, preparatory to the construction of a head ditch, and for borders, and a ditch along the south line of the same (Record, pp. 7-9, 45, 70, 72, 104-105). For other details see Hart *vs.* Cox, 171 Cal., 366, referred to in the present record, page 116.

But on November 8, 1906, defendant, during the temporary absence of the plaintiff, and in sight of all her improvements (Record, p. 76), moved a "tent-house" on to the northeast corner of the 160 acres in controversy and established his residence there and laid claim thereto (Record, pp. 70-71, 105). Shortly afterwards he was notified that the plaintiff claimed such 160 as a part of her 320-acre tract. He lived on the land thenceforward until March 15, 1909, when he was turned out of possession by the sheriff of Imperial County as the result of the action brought against him by the plaintiff to recover such possession (Record, pp. 70-71, 106). During his stay on the land he grubbed out some of the greasewood, constructed a ditch half a mile in length along the east side thereof, constructed borders on 40 or 60 acres of the southern part, and plowed out lines for additional borders sufficient to cover 40 acres more. To do

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*NOTE.—This word "borders" occurs repeatedly in the record. A "border" in the vocabulary of irrigation in that region means a low ridge elevated a little above the neighboring surfaces for the purpose of confining irrigating water within convenient areas, and is usually thrown up by means of an implement known as a "Fresno scraper."

that work "he tore down some of the borders erected by Miss Hart" (Record, pp. 70-71, 76).

During such time Cox purchased certain shares of water stock which he endeavored to have placed on the land. The water company issuing the same refused to so place it because of the previous proceedings by the plaintiff (Record, pp. 71, 106); and, as appeared without conflict at the trial, Cox never conducted water from any source upon any part of the tract to which he laid claim, nor did he at any time irrigate or cultivate any part of it (Record, p. 102).

The action brought by Miss Hart against Cox in the superior court of Imperial County was founded on her prior actual possession of the land (Record, pp. 106-7); the trial resulted in a verdict and judgment for the plaintiff and against defendant; he appealed to the Supreme Court of California, where the judgment was affirmed (171 Cal., p. 364; Record, p. 116), that court holding that the evidence established the plaintiff's actual occupancy and possession of the land in dispute. The evidence in that action and before the Supreme Court of the State is referred to in the present record, pages 106, 116; it is set out in substance in 171 Cal., 366-8. The judgment of the trial court in that case and the ousting of Cox from the land March 15, 1909, occurred before any decision of the U. S. land officers in the controversy between the parties (Record, pp. 106, 116).

Cox on July 17, 1907, made an application for what is now the said tract 113, by what purported to be a metes-and-bounds description; such application was rejected by the Resister and Receiver; upon his appeal the rejection was affirmed by the General Land Office July 13, 1909, and such decision became final (Record, pp. 68, 162).

On July 30, 1907, Miss Hart made application, attempti
to describe the land by subdivisions of the old survey
1856, "as near as it was possible" to describe the land
that survey. (Record, p. 15.) Such application was in
respects in compliance with law "as to form and substan
(Record, p. 86). It was rejected because the lands s
wanted to enter and so described were supposed to be claim
by others—a supposition unfounded in fact (Record,
196). An appeal by her to the General Land Office w
deferred awaiting the resurvey of the township (Record, p
68-69), and such rejection was afterwards affirmed (Recor
p. 17).

After the filing of the official plat of the resurvey in th
local land office February 23, 1909, viz., March 1, 1909, Co
filed a desert-land application for the said tract 113, and o
May 15, 1909, within the 90 days allowed for claiming h
"preference right" under the Act of March 28, 1908, plai
tiff filed her desert-land application for said tracts 113 an
114 and the south half of tract 115 (Record, pp. 68-69, 152

Although the rejected application of Cox filed July 1
1907, was the first ostensible "filing" on the land, it w
proved at the trial that the plaintiff had not been remiss i
her efforts *prior to that time* to file an application in the loc
land office; on several occasions between February, 1906, an
May, 1907, and again in June, 1907, she visited such loc
land office for the purpose of entering the land, but w
informed by the local officers, in substance, that the onl
way she could obtain the right of entry "would be by settlin
upon it and holding possession and waiting until the resurv
had been made" (Record, pp. 124-5). At length, in sh
desperation it seems (Record, pp. 121-22, 125-26), on Ju

30, 1907, she filed an application endeavoring to describe the land in the manner required by the order of the General Land Office of date May 24, 1907 (Record, p. 141), accompanying it with supporting affidavits and also by a map on which was shown the plan proposed by her for the reclamation and irrigation of the land (required by the Act of March 3, 1891, Stats., p. 1096) and tendered the money required to be paid (Stats. 1877, p. 377) on entry, which application was rejected, as above stated (Record, pp. 86, 126).

Upon the ousting of Cox from the land in dispute, in 1909, plaintiff again took possession of it *"and completed the reclamation thereof,"* taking water onto the land at the "high corner" for that purpose (Record, p. 126).

The Register and Receiver found, and the Commissioner was of the same opinion, that Miss Hart had acted "in good faith"—which we understand to mean that she was entirely sincere in her intention to reclaim, by bringing water upon and cultivating the whole tract of 320 acres claimed by her, and to make entry of the land in accordance with law. They said:

> "The work of reclamation was carried on in good faith after she became of age and for several months prior to Cox's appearance on the scene" (Record, pp. 72, 75, 166).

The treatment of the legal aspects of the case in the Land Department may now be stated:

The conclusions justly and vigorously expressed by the General Land Office, reversing the decision of the Register

and Receiver, and approved in the decisions of both courts below in the present cause, appear in the following extracts from the opinion addressed to the Register and Receiver:

> "Notwithstanding the facts that you found that Miss Hart went into possession of the 320-acre tract, and was reclaiming it in perfect good faith, you held that Cox, with actual notice of her claim and right, may take possession and by residence thereon, dispossess her of 160 acres of her claim. It follows logically, that if Cox can take 160 acres of Miss Hart's claim in this way, then Smith, or Jones, or both, may pitch their tents on the other part of her claim, and obtain a superior right to the land actually reclaimed. * * * Was Cox a *bona fide* settler? It is true, as you state, that the judgment and decision of the Superior Court of Imperial County ousting Cox from possession of the land in dispute, * * * is not binding on you or the Department; but as the case was thoroughly tried by the court to a jury, a judgment and decision, between the same parties, upon the identical issues involved here, are highly persuasive of being just and right. The same witnesses testified in that case as in this, and under instructions by the court as to the law governing the case, the jury found that Cox was not entitled to the possession of the land claimed by Hart, and that Hart was so entitled.
>
> "The act of March 28, 1908, provides, in part, as follows: '*Provided, however,* that an individual qualified to make entry of desert lands under said acts, who has, prior to survey, taken possession of a tract of unsurveyed land not exceeding in area 320 acres in compact form, and has reclaimed, or has, in good faith, *commenced the work of reclaiming the same,* shall have a preference right, etc.' * * * To me it

seems as Miss Hart had met every requirement of the act in question to entitle her to a preference right of entry, the act is not ambiguous and its provisions are plain and easy to understand. * * * It is conceded that these lands occupied the status of unsurveyed lands. It is admitted that Miss Hart is qualified to make a desert entry. It is also admitted that she has commenced the work of reclaiming the lands in dispute. In fact, she has already irrigated about five acres of the land in dispute and planted it to barley and you found that she had acted in perfect good faith. What else could she do to insure her a preference right of entry? Certainly she could not be required to improve each and every part of these 160 acres before she would be immune from trespassers and claimants. * * * You found that Miss Hart had acted in perfect good faith, and the record of the testimony so shows, and it is not disputed but that Cox saw all these improvements when he erected his tent on Miss Hart's claim; in fact, he tore down some of the borders erected by Miss Hart. If Cox can legally take and retain possession of the land in dispute, he could just as legally have taken possession of the other 160 acres, when he would have found 80 acres improved and irrigated, instead of 5.

"It seems that when Congress passed the act of March 28, 1908, it intended to protect the rights of persons in the condition as Miss Hart is situated. After this act had been passed, this office repeatedly held that its effect was retroactive, not in a limited sense, not in part as held by you, but in a broad and common-sense view of giving effect to the clear intention of Congress and protecting those who had commenced the reclamation of unsurveyed lands, not exceeding 320 acres in extent, from all intruders

> upon any part of said tract, until they had opportunity to reclaim the same and for this purpose a preference right was given" (Record, pp. 73-77).

The opinion of the Assistant Commissioner then referred to the case of Virgil Patterson, 40 L. D., 264, where the land involved was situated similarly to the land of Miss Hart, and quoted the syllabus of the decision of the Department in that case (opinion by Assistant Secretary of the Interior) as follows:

> "The possession and improvements contemplated by the act of March 28, 1908, offering a preference right to make desert land entry to one who has taken possession of a tract of unsurveyed desert land, and has reclaimed or has in good faith commenced the work of reclaiming the same, are not such as are required of the settler under the homestead law, but it is sufficient under that act if the possession and improvement conforms to the requirements of the desert land law, and evidence the party's good faith under that law" (Record, p. 78).

The conclusion of the Assistant Commissioner was that Miss Hart

> "has, by her acts of improvements, irrigation, and cultivation of the 320-acre tract claimed by her, become entitled to preference right of entry" (Record, p. 79).

On the appeal of Cox to the Secretary of the Interior the Department reversed the decision of the General Land Office and held that the application of Miss Hart should be rejected as to the land in dispute, and that Cox should be al-

lowed to enter the same. The opinion of the Honorable Assistant Secretary, rendered August 5, 1913, appears at pages 181-4 of the record and is reported in 42 L. D., 592. The Assistant Secretary stated a conclusion opposite to that of the Assistant Commissioner relative to the effect of the Act of March 28, 1908; he said:

> "These lands, although given by the Land Department the status of unsurveyed lands, pending their resurvey under said act of July 1, 1902, were, in fact, surveyed lands, under the stated old survey of 1856, and said act of March 28, 1908, *had no application whatever to said lands.* Henderson T. Dizney *et al.* (41 L. D., 257)" (Record, pp. 79, 168, 183).

The Assistant Secretary declared the case of Virgil Patterson (40 L. D., 264), relied upon in the decision of the Commissioner, to be distinguishable from the case of Hart *vs.* Cox before him, and then, as ground and reason for awarding the right of entry to Cox, he went back to Cox's old application, of July 17, 1907, where the land was attempted to be described by metes and bounds; an application that was rejected by the local land office July 23, 1907, which rejection was affirmed by the General Land Office October 3, 1910, and was not further appealed (Record, pp. 18, 54). On that matter the Secretary's decision was this:

> "Cox's application made by metes and bounds, was in fact a proper application and, but for such mistaken requirement [of a different kind of description] by the land department, should have been allowed. His claim was substantially good and valid, and, as in the case last above referred to [Stephenson *vs.* Pashgian, 42 L. D., 113], the Department is not dis-

posed to hold that he is now prejudiced in the consideration of his case by failing then to appeal further to the Department. He is first in right by being first in the filing of a proper application, both pending the resurvey of said lands and after the filing of the resurvey plat. His application should, therefore, be allowed and that of Hart rejected as to the land in conflict" (Record, pp. 184-5, 79-80).

It is plain from the decision of the Honorable Assistant Secretary that both the statute of March 28, 1908, and the fact of Miss Hart's prior possession and improvement of the land, were treated by him as matters of no consequence.

There are, however, some questions of fact important in the case, distinctly held by the Secretary, but now *assailed in the argument for the appellant in this court.* They are that the lines of the old survey of 1856 *"had been obliterated"* (Record, pp. 182, 184; 42 L. D., 593, 594), and that since April 1, 1906, "these lands have been recognized and considered * * * as *having the status of unsurveyed lands* pending the filing of plat of resurvey, which was filed February 23, 1909" (Record, pp. 181, 183, 79; 42 L. D. 593). While admitting that the lands, including the tract in dispute, occupied, and were given by the Department, "the status of unsurveyed lands," the Assistant Secretary yet held that by reason of the old survey of 1856, the "lines of which had been obliterated," they were in fact *"surveyed,"* so as to prevent any operation of the proviso in section 1 of the Act of March 3, 1908.

After said decision of the Department adverse to her the appellee protested the final proof of appellant and applied to the land office for leave to contest such proof of Cox, on the

ground that he had not made the expenditures and done the work required to entitle him to enter the land (Record, pp. 185-192), which application was denied on the grounds, apparently, that it was an attempt to relitigate a closed case, and that the proceedings, successfully prosecuted by the plaintiff in the State courts to recover possession of the land, created a condition which prevented Cox from making the "required expenditures," etc. (Record, pp. 203-8). Within fifteen days after the patent was issued to Cox plaintiff began the present suit in the Federal District Court (Record, p. 40).

The history above given shows that the appellee has done all that was necessary under the law to entitle her to receive a patent—unless the conclusions of the Secretary respecting the law declared in favor of Cox are correct. She has made, or offered to make, the payments requisite to be made to the Government and expended much more than $3.00 an acre for purposes of reclamation—$1,600.00, at least, for water alone (Record, p. 90). She had cultivated, before the intrusion of Cox upon the land in November, 1906, *twice as much of the 320-acre tract* claimed by her as was necessary to be cultivated in order to obtain a patent for the whole thereof (26 Stats., pp. 1096-7; Record, pp. 76, 104, and elsewhere). After Cox's ejection from the land she completed the reclamation of the whole of it (Record, pp. 102, 126-7, and elsewhere). No point has been made in the brief for appellant against the right of appellee to have become the purchaser of the land if she is right in her contentions as to the law.

I.

THE ACT APPROVED MARCH 28, 1908 (35 Stats., p. 52), INCLUDED IN ITS SCOPE THE PUBLIC LANDS IN THE IMPERIAL VALLEY. THE PROVISO IN SECTION 1 THEREOF ALLOWED TO PLAINTIFF THE CLEAR "PREFERENCE RIGHT" TO ENTER THE LAND IN SUIT.

The Secretary held that "said act of March 28, 1908, had no application whatever to said lands," for the supposed reason that they "were in fact surveyed lands, under the stated old survey of 1856" (Record, p. 183). We respectfully maintain that this opinion was manifestly erroneous, and that the opposite conclusion of the Circuit Court of Appeals (Record, p. 226), of the trial court (Record, pp. 82-83), and of the Commissioner of the General Land Office (Record, pp. 76-78) is manifestly sound law.

In considering the subject, the conditions prevalent in that region at the time of the passage of said act of 1908, and which had been prevalent for a number of years previously, should of course be kept in mind; they are part of "the history of the times," and hence are means for interpreting the statute (United States *vs.* Freight Association, 166 U. S., 318-319). Those conditions demonstrate the need in the Imperial Valley of remedial legislation precisely such as was afforded by the said act of 1908; the act must have been passed in view of and to meet such a situation. As said by the learned Judge of the District Court, "We must assume that Congress knew what the Land Department was doing concerning these lands in the Imperial Valley" (Record, p. 82).

Said act of March 28, 1908, first provides that after its passage the right to make entry of desert lands "shall be restricted to surveyed lands of the character contemplated" by the desert-land acts. The proviso that follows is—

> "That any individual qualified to make entry of desert lands under said acts who has, prior to survey, taken possession of a tract of unsurveyed desert land not exceeding in area three hundred and twenty acres in compact form, and has reclaimed or has in good faith commenced the work of reclaiming the same, shall have the preference right to make entry of such tract under said acts, in conformity with the public land surveys, within ninety days after the filing of the approved plat of survey in the District Land Office" (35 Stats., p. 52).

Surveys are essential to the disposal of the public lands (Horne *vs.* Smith, 159 U. S., 40, 44-45; Buxton *vs.* Traver, 130 U. S., 232, 235).

It is the office of a survey to *create,* not merely to identify, sections and parts of sections of Government land. Until a survey they have no existence. This is well settled.

Sawyer *vs.* Gray, 205 Fed. Rep., 160, 163, and cases cited.

Bullock *vs.* Rouse, 81 Cal., 590; 594-595, and cases cited.

In the Imperial Valley, irrespective of the effect to be accorded to the act of July 1, 1902 (32 Stats., 728), providing for the resurvey of those lands, *the survey of* 1856 *had become practically non-existent;* its lines, its corners, its monuments or other objects on the ground, their bearings

and distances, the application of its field-notes and plats were unascertainable and had been officially declared to be unidentifiable long before the passage of said Act of March 28, 1908.

As a thing once done, the old survey of 1856 was a matter of history, but it had disappeared for practical purposes as completely as the furrow of a ship in the sea disappears. These statements are easily demonstrable.

In the first place the attempts made to discover traces of the old survey discovered scarcely anything except that it had been extremely inaccurate. Speaking of an unsuccessful attempt at retracement of the 4th standard parallel south in the Imperial Valley, the Department said:

> "It is further apparent that this retracement did not comport with the original survey thereof *which survey* was also, it would seem, *grossly inaccurate*" (*Re* Herman H. Peterson, 40 L. D., 562, 566).

In the same case, quoting from the previous case of Fannie A. Salisbury (39 L. D., 471) it said:

> "The Government surveys, which were extended over these townships in 1855 and 1856, were found upon examination to be very irregular" (40 L. D. 564).

According to the statement in the opinion of the Department in the case of G. C. Gingery (45 L. D., 50) a case often cited by the appellant, the lines of the old surveys were mislocated; as we understand that opinion, mislocated a distance of about a mile and a half in one direction and two miles in another. According to the testimony of the defendant's witness Friel in this case, "There was an excess of 5 chains to the

mile or about 1¼ miles in excess of the entire valley, and a little over a mile in north and south of the entire valley" (Record, pp. 131-132).

But secondly, there was a virtual obliteration of the monuments of the old survey and consequent impossibility of ascertaining its lines, such as they were.

Observe the statement in the decision in Stephenson *vs.* Pashgian (42 L. D., 113, 114):

> "When settlers began to seek land in that section, *all* of the monuments of the original survey *had disappeared.*"

It may not be exactly true that *all* of those monuments had disappeared, but the statement of the Secretary to that effect was substantially correct. Defendant's witness Friel testified at the trial that in searching "through the whole of Imperial Valley [at least 26 township, 32 Stats., p. 728] looking for monuments of the original surveys" he found six (Record, p. 127). He said also that "one old-established corner within the township does not control as to establishing the township lines of that township. If we did that in Imperial Valley we would have different township lines for every township" (Record, p. 133). In the case of Herman H. Peterson (40 L. D., 562) the Assistant Secretary, speaking of the old surveys in the Imperial Valley, said:

> "About 1900 * * * the corners of the public-land surveys had been so far lost and destroyed as to render it difficult, if not almost impossible, to trace the subdivision of even township lines" (40 L. D., p. 564).

That case contains a somewhat extended narrative of the proceedings taken for the purpose of the resurvey authorized by the Act of July 1, 1902 (32 Stats., p. 728). The case indicates well the confusion respecting lines and boundaries in the Imperial Valley during the time the Department was carrying out the resurvey authorized by said statute of 1902. Summarizing the situation the Assistant Secretary said:

> "From the above somewhat exhaustive statement of the steps taken in the resurvey of the Imperial Valley region it is apparent that when the irrigation projects now there existing were started, practically *all of the evidence of the original survey had disappeared.*"

The case last cited concerns the attempt to locate certain sections 16 and 36 of the old surveys for the purposes of grants thereof made by the State of California, as school sections, title to which passed to the State under former legislation of Congress (Act of March 3, 1853, 10 Stats., 246). It was remarked further:

> "The resurvey made by the Government in the beginning was an attempt to retrace the old original survey, but, as above pointed out, such attempt failed and it is now a physical impossibility to identify on the ground sections 16 and 36 according to the original surveys. * * * The difficulty in the present matter is that there is no way to determine what land passed to the State of California under the original survey. *All vestiges of that survey have been wiped away*" (40 L. D., pp. 570-71).

The conclusion of fact on this subject reached by the courts below may here be pointed out. The District Court said:

> "The evidence of the survey of 1856 upon the ground in that vast area covered by said act [the Act of July 1, 1902] had become useless by reason of the fact that the lines of the survey were obliterated" (Record, p. 81).

The Circuit Court of Appeals said:

> "The land is situated in the Imperial Valley * * * the lands whereof were originally surveyed in 1856. Settlement did not begin until nearly half a century later. It was then found that the markings of the survey had so far been obliterated that it was practically impossible to locate the lines thereof" (Record, p. 224).

The old survey having been itself "grossly inaccurate" and the traces of the same having been effaced, of course attempts to describe particular tracts in terms of such survey became but guesses and were abandoned by the Department as "impossible."

Such was the repeated decision of the Department. True, on May 24, 1907, an order was promulgated by the General Land Office that applications to enter desert lands "filed subsequent to March 31, 1906, must describe the lands with reference to the established lines of the original survey," but that was coupled with the further statement that the description was *"to be adjusted by legal subdivisions to the lines of the resurvey when established"* (Record, p. 141), and the Register of the local land office was required to endorse upon every such application a statement that it was "subject to ad-

justment by legal subdivisions to lines of the resurvey authorized by the Act of July 1, 1902" (Record, p. 142), so that the attempt to use the old survey as the means of identification under that regulation was tentative, only rudely approximate, temporary, and known to be such. Probably the purpose was to enable the officials of the local land office at Los Angeles to keep some approximate trace of the localities of descriptions in filings which were being made by comparing them with the old plats—and so indicating the *vicinity* in which the claimants *supposed* their respective claims to be situated—for as afterwards said by the Department:

> "All land claimants filed upon their lands in accordance with these *private* surveys while the records of the local land office at Los Angeles were being conducted according to the plats of the old original surveys made long prior thereto" (case of Herman H. Peterson, 40 L. D., 570).

In January, 1910, the Commissioner, speaking of the said regulation of May 24, 1907, said that it was "intended to prevent confusion in descriptions of lands applied for, resulting from private surveys of the Imperial Valley lands and to reduce the conflicts between claims to a minimum. Applicants were not precluded from filing new applications *in due form*" (Record, p. 151). The view above indicated of the purpose of said regulation of May 24, 1907 (Record, p. 141), is supported in Kendall *vs.* Bunnell, California District Court of Appeal, 205 Pac. Rep., 88.

If the regulation of May 24, 1907, was designed to require *conformity* of descriptions to the old survey of 1856, the requirement was afterwards declared to be an "impossible condition." In the case of Herman H. Peterson above re-

ferred to, dealing with the Sections 16 and 36 in the Imperial Valley, the Assistant Secretary said:

> "It is now a physical impossibility to identify on the ground Sections 16 and 36 according to the original surveys" (40 L. D., p. 570).

Of course if it was physically impossible to identify Sections 16 and 36 it was likewise impossible to identify any other sections in the townships of the old survey. In the later case of Stephenson *vs.* Pashgian (42 L. D., 113, 115) and considering land situated in a so-called "excess strip," which is the situation also of the land involved in the suit here (Record, p. 77), the Assistant Secretary said:

> "As to the land here under consideration, description *by the original survey was an impossibility.*"

And in the decision of the Secretary of which we complain in the present case it was declared, in the attempt to show that Cox's application of date July 17, 1907, to enter the land in suit, was valid, that:

> "The required description [in said regulation of May 24, 1907] in an application, of land by the old survey was an impossible condition and a description by metes and bounds the only feasible one" (Record, p. 184).

It was a strangely inconsistent view of the Assistant Secretary that such a survey, by which nothing was any longer surveyed, and by which no land could be identified, was yet of such malevolent efficacy that it prevented the taking effect of the Act of March 28, 1918, on the desert lands of the Imperial Valley, which for years before, the Department

had held to "have the status of unsurveyed lands" (Record, pp. 181-2).

We have now shown that the survey of 1856 was itself grossly inaccurate, and its lines and monuments became obliterated before settlements in the Imperial Valley began; and that it was impossible to identify on the ground even its major sub-divisions. The District Court below said that:

> "This act [The Act of July 1, 1902, requiring the resurvey] recognized that the survey of 1856 was of no practical use * * *. It was impractical to dispose of these lands by Congressional subdivision, according to the survey of 1856" (Record, p. 81).

The Circuit Court of Appeals said substantially the same thing (Record, p. 224). Certainly the evidence justifies this conclusion.

The Act of July 1, 1902, authorizing the resurvey (32 Stats., 728) was passed in view of, and for the purpose of remedying, the conditions we have attempted to describe. Said the Supreme Court of California:

> "By that time [the beginning of settlements in the Imperial Valley] the monuments referred to in the field notes of the survey of 1856, had, to a great extent, been obliterated and it was difficult and in many cases impossible to trace upon the ground the boundaries of the Governmental subdivisions as established by the survey. Moved, no doubt, by the knowledge of these conditions, the Congress of the United States passed an act entitled 'An act providing for the resurvey of certain townships in San Diego County, California'" (Nichols *vs.* McCullom, 169 Cal., 611).

Considering the conditions, we claim it to be impossible to deny, with any show of reason, that it was a new survey, and a substitute for the old, that was to be undertaken by the Department. The Circuit Court of Appeals said in this case:

> "The Act of 1902, authorizing a resurvey was a legislative declaration that the lands were to be regarded as unsurveyed land, that a new survey was to be substituted for the old, and that by the new survey the future disposition of the land was to be regulated. By a proviso in that act protection was afforded as to the then existing claims of occupants. The inference follows that as to all whose rights were initiated thereafter the resurvey was intended to be controlling" (Record, p. 226).

The views of the District Court were stated a little more at length. That court said:

> "The Act of 1902 authorized a resurvey; it did not direct that the mounds and monuments be re-established and marked upon the ground; it did not direct that the lines of the old survey be ascertained and the stakes reset. But this act recognized that the lands *were not surveyed land, so that they could be disposed of* in accordance with the law, and directed that they be resurveyed. All the acts of the Land Department, after the passage of the Act of 1902, so far as they have been called to the attention of the court, recognized that there was to be a new survey, and that the lands were to be disposed of according to the new survey, and that the survey of 1856 was an abandoned thing" (Record, pp. 81-82).

Of course, not abandoned as a fact of history; it is a noble line of Dryden,

"Upon the past not heaven itself has sway,"

But abandoned for purposes of administration and future legislation.

The Supreme Court of California has said substantially the same thing in a series of cases. In Nichols *vs.* McCollum (169 Cal., 611) the controversy was about certain land in a 16th section—school land of the State—in the Imperial Valley. The court said:

> "If the Act of 1902 has been rightly interpreted by us, there is no occasion to consider the argument of respondents to the effect that the decision of the Land Department of the Government fixing the location of section 16 was erroneous and that said section was placed by the new survey at a different place from that occupied by section 16 under the survey of 1856. *The new survey superseded the old one.* * * * (169 Cal., 614-16.)

Which language was quoted and approved in the subsequent case of Miller *vs.* Marchus (171 Cal., 259). To same effect is *Re* Scott, 182 Cal., 83, 85.

It is also held in that case that the new survey had the effect (except as against previous actual occupants of lands, whose rights were protected by the proviso in the statute of July 1, 1902, 32 Stats., 728) to fix even the boundaries of school sections, title to which had passed to the State under the Act of 1853 (10 Stats., p. 246), so that such sections would be found in the place delimited by the new survey, and not in a place called for in the old survey (allowing that such old place was ascertainable). Obviously such

effect could be worked only because the old survey was, for administrative purposes, and for the purpose of disposing of the lands covered by it, to be abandoned and the new survey substituted in its stead. From the necessity of the case in the Imperial Valley, as well as for the reasons intimated by the courts, this conclusion we claim to be irrefutable.

Said Act of Congress of July 1, 1902, we maintain to be by its own terms a complete vindication of the interpretation put upon it by the courts below; it "was a legislative declaration that the lands were to be regarded as unsurveyed lands"; the lands, that is to say, required by its terms to be resurveyed (Record, p. 226). There was to be a new survey. Now a survey of the public lands has for its purpose the *creation* of townships, sections, and fractional sections whereby the land may be controlled and administered. When the Act of 1902 provided that there should be a resurvey it necessarily meant that there should be *created* such townships, sections and subdivisions. This is so in the nature of things.

> "It is the office of a survey to create, not merely to identify, sections and parts of sections of Government land." Sawyer *vs.* Gray, 205 Fed. Rep., 160-163, and cases there cited.
>
> "Even after a principal meridian and a base line have been established, and the exterior lines of the township have been surveyed, neither the sections nor other subdivisions can be said to have any existence until the township is subdivided into sections and quarter sections by an approved survey. The lines are not ascertained by the survey but they are created." Robinson *vs.* Forrest, 29 Cal., 325.

> "A person may approximate to the lines that may be run—may surmise the precise lines—but the tract is not a separate legal entity until the survey is made and approved under the authority of Congress." Middleton *vs.* Low, 30 Cal., 605.

The last two quotations were repeated with approval in Bullock *vs.* Rouse, 81 Cal., 594-595.

Hence as to said lands the statute by authorizing a resurvey authorized the creation of new townships, new sections, new subdivisions; *necessarily the lands were unsurveyed* lands until the process was completed.

That Congress did not intend an impossible thing and try to resuscitate the old survey is apparent from the circumstances pointed out by the District Court that the Act of 1902 directed neither that the monuments of the old survey be re-established nor that its lines be ascertained (Record, p. 81). Accordingly, the Department did neither. There was some slight attempt (as was not unnatural) at an ascertainment of some old lines but the result of the attempt was a ludicrous failure and it was abandoned. In the summary of the discussion of the subject of surveys in the Imperial Valley in the case of Herman H. Peterson it was said:

> "The resurvey made by the Government in the beginning was an attempt to retrace the old original survey, but, as above pointed out, *such attempt failed.* * * *" (40 L. D., 570.)

Such attempt that failed was to retrace the 4th standard parallel south as shown in that opinion:

"The survey that was made resulted in the establishment of a standard parallel having a right angled break in it of over one mile and did not comport with the original survey thereof. * * * it was beyond the bounds of possibility that the deputy who ran the 4th standard parallel south originally could have made any such break in his line as the position of the corners established by Henderson demanded" (40 L. D., 565-6).

It further appeared in the said opinion that in the year 1909, the Commissioner, instructing the Surveyor General on the subject of the location of the 16th and 36th sections, informed that officer, in substance, that no "authentic original corners had been found" (40 L. D., 568).

Finally, and perhaps all that we need to have shown in this behalf, is that the appellant here in his answer to plaintiff's bill, formally

"alleges that no attempt was made in said resurvey to retrace the survey of 1856" (Record, p. 55).

In Kendall *vs.* Bunnell, California District Court of Appeal, Jan., 1922, often cited by appellant, the court said:

"It is common knowledge that, in so far as it has been possible to locate on the ground any of the lines of the original survey, those lines have generally been found to be far apart from the correspondingly numbered township and section lines of the new survey" (205 Pac. Rep., 87).

Under the circumstances shown what was the department to do? Obviously there was but one course, namely, the

course which the necessity of the case required—conform the conduct of the land officers to the reality and administer the lands as *unsurveyed,* and this was done. True they called it giving the lands of the Imperial Valley "the status of unsurveyed lands." Said the learned judge of the district court:

> "The Land Department held that they occupied the status of unsurveyed land, which could mean nothing else than that the lands were unsurveyed lands *so far as the administration of the law was concerned"* (Record, p. 81).

The Circuit Court of Appeals took the same view although not expressing it in just those words (Record, pp. 226-7).

Their conclusion that the lands were accorded the status of unsurveyed lands by the department is fully sustained by the evidence and the decisions. The department abandoned (if it ever entertained) any purpose of selling the desert lands of the Imperial Valley or to otherwise administer the same, by subdivisional descriptions attributable to the old survey of 1856. In March, 1906, the Commissioner ordered that all entries in the 26 townships mentioned in the Act of July 1, 1902, be suspended (Record, p. 137); a little later the suspension was modified in a manner not material here.

This suspension of entries was a policy adopted so far as concerns the acceptance of demands or the issuance of final papers for lands in said townships, as early as September 13, 1904, "until the matter of resurvey now pending has been finally adjudicated" (Record, pp. 138-9). Then, on May

24, 1907, the order of suspension of said lands from entry underwent modification,

> "So as to permit desert land entry thereof the same as though the lands were unsurveyed" (Record, p. 141).

But all descriptions to be received on such entries were expressly declared to be subject to adjustment "by legal subdivisions to the lines of the resurvey when established," and applications were to be endorsed accordingly, so that there could be no misunderstanding about the operation of the resurvey when completed upon what were, pending the completion of the resurvey, to be regarded as unsurveyed lands (Record, pp. 141-2, 143).

In August, 1907, the Commissioner instructed the local register and receiver in the most formal way that:

> "These lands occupy the status of unsurveyed lands, for which reason you have been authorized to accept desert land entries therefor. The lands will not be subject to ordinary entry or selection until resurveyed and the plats officially filed (Gen. Cir. Jan. 25, 1904, p. 77)" (Record, p. 146).

Hence the *only entries* permitted pending the resurvey were desert entries—because the latter might be made of unsurveyed lands (Record, pp. 143, 145, 146).

In the case of Virgil Patterson, decided September 8, 1911, the Assistant Secretary, commenting on the possession by Patterson of the land involved in that case, and the effect thereon of the proviso in the Act of March 28, 1908, remarked:

> "Patterson's possession and attempt at reclamation of these lands * * * appear to have been in good faith; and while said lands were not, strictly unsurveyed lands at the time he took such possession * * * they appear to have been regarded by the Land Department as having the status of unsurveyed lands while under such suspension for resurvey," etc. (40 L. D., 264, 266).

Doubtless, the qualification "strictly" was meant by the Secretary there to admit the fact that there had been in the remote past a survey; but plainly he considered it as of no consequence against "the status of unsurveyed lands" accorded to them by the Department, for he held them to be "unsurveyed" within the meaning of that term in the proviso in section 1 of the Act of March 28, 1908.

We fear we pursue this subject to undue attenuation, but beg to point to the declaration in the opinion of the Honorable Assistant Secretary which we question in this case. He said:

> "Since April 1, 1906, these lands have been recognized and considered * * * as having the status of unsurveyed lands pending the filing of plat of resurvey, which was filed February 23, 1909" (Record, p. 181).

Now, with the conditions above narrated before them, the courts below reached their conclusion touching the effect of the Act of March 28, 1908 (35 Stats., 52); we claim that such conclusions were inevitable. The District Court said:

> "Of course, they [the Lands of the Imperial Valley] were surveyed lands in a certain sense; that is to say, they were lands which had been surveyed.

> The Land Department held that they occupied the status of unsurveyed lands, which could mean nothing else than that the lands were unsurveyed lands, so far as the administration of the law was concerned. * * * The question arises then whether or not the proviso in the Act of March 28, 1908, applies to this controversy. We must assume that Congress knew what the Land Department was doing, concerning these lands in the Imperial Valley. * * * I am of the opinion that the Commissioner of the General Land Office was correct in his conclusion that the Act of March 28, 1908, should apply to this case and so hold" (Record, pp. 83-83).

The Circuit Court of Appeals said:

> "We are of the opinion that the court below properly held that at the time when the claims of the parties hereto were initiated the land was unsurveyed land and that the Act of March 28, 1908, was applicable thereto and conferred a preference right upon the appellee. The Act of 1902 authorizing a resurvey was a legislative declaration that the lands were to be regarded as unsurveyed lands, that a new survey was to be substituted for the old, and that by the new survey the future disposition of the lands was to be regulated. * * * The inference follows that as to all whose rights were initiated thereafter the resurvey was intended to be controlling" (Record, p. 226).

Half of the brief of the learned counsel for appellant is devoted to an effort to support the decision of the Secretary that the lands in question were in fact surveyed lands "under the stated old survey of 1856," and that the proviso in the Act

of March 28, 1908, had no application whatever (pp. 17-42 of that brief).

What has been said above obviates the necessity of an extended examination of the somewhat numerous specific assertions urged by the appellant in this behalf. Perhaps, however, we should notice some of them, it being hardly practicable within reasonable limits to discuss them all.

(*a*) It is stated in said brief (p. 19) of the learned counsel for appellant that "The Act of July 1, 1902, *supra*, was recommended because of the gross inaccuracies of the private retracements of the old surveys of 1854-7." A similar assertion occurs at page two thereof. This statement is itself a "gross inaccuracy," for it ignores the fact that the resurvey authorized by the Act of 1902 was made necessary because the original surveys were found upon examination to have been "very irregular," and that "practically all of the evidence of the original survey had disappeared" (Case of Fanny A. Salisbury, 39 L. D., 471; case of Herman H. Peterson, 40 L. D., 562, 564, 570). We have above digested, perhaps too fully, the evidence and authorities on the subject.

But suppose it were true, as stated in said brief (p. 19), that the Act of July, 1902, "was recommended" because of the inaccuracies "of private retracements of the old surveys" the circumstance would only emphasize the conclusion that the language in the proviso of section 1 of the Act of March 28, 1908, declaring a "preference right" "to make entry * * * in conformity with the *public land surveys*," was especially directed to conditions in the Imperial Valley; it is a reasonable inference from its language that section 1 of the Act of March 28, 1908, was designed to rectify the confu-

sion existing in the Imperial Valley by requiring all entries to be "in conformity with the *public* land surveys."

(*b*) Appellant also asserts (his brief, p. 18) that "The plaintiff in her declaration (Record, pp. 16 and 17) alleges that she knew and adopted the location of the 1856 survey." The assertion is wrong. Referring to the record at said pages 16 and 17 it appears that in the appellee's bill it is alleged that on July 30, 1907, she filed in the local land office a desert-land application describing the lands she desired to enter, 320 acres in all, by certain sectional subdivisions, and that this

> "was a correct description of said land according to the aforesaid survey of 1856, *as near as it was possible to describe said land* according to said survey of 1856,"

and that her application was rejected (Record, pp. 16-7). At and previous to that time all applications were required by the order of the Commissioner of May 24, 1907, as we have above pointed out, to "describe the land with reference to established lines of the original survey," but subject expressly to future adjustment "by legal subdivisions to lines of resurvey authorized by Act of July 1, 1902" (Record, pp. 141-2). Plainly, the appellee was doing the best she could to comply with the regulation of the Land Office then in force "as near as it was possible." That it was impossible is asserted in the decision of the Secretary on which the appellant relies to support the patent issued to him (Record, p. 184).

(*c*) The opening brief for appellant, at pages 20-21, contains sundry erroneous statements about the alleged first

acts of the Department under the statute of July 1, 1902. One would infer from such statements that the resurvey under the Act of July 1, 1902, was an adoption, a retracement, of the old survey of 1856, the contrary of which we have above demonstrated. The *answer of the appellant* expressly

> "alleges that no attempt was made in the said resurvey to retrace the survey of 1856" (Record, p. 55).

which is substantially true. As to the supposed retracement of the 4th standard parallel south run by one Henderson, and the alleged approval thereof, the very decision cited by appellant (Opening Brief, pp. 20-21; 40 L. D., 562) shows that such survey of Henderson

> "Resulted in the establishment of a standard parallel having a right-angled break in it of over one mile *and did not comport with the original survey thereof*" (40 L. D., 565).

In the same decision it was declared by the Assistant Secretary who wrote it that:

> "It is further apparent that this retracement [of such parallel] *did not comport with the original survey thereof,* which survey was also it would seem, grossly inaccurate" (40 L. D., 566).

In the same decision the Assistant Secretary said:

> "The resurvey made by the Government in the beginning was an attempt to retrace the old original survey, but, as above pointed out, *such attempt failed*" (40 L. D., 570).

(*d*) The argument of appellant (Opening Brief, pp. 23-25, and elsewhere) about the order of the Commissioner of date May 24, 1907, whereby applications for entries were required to

> "describe the land with reference to the established lines or the original survey," etc.,

contains sundry statements which, if accepted as correct, might excite astonishment that Congress ever passed the Act of July 1, 1902, authorizing a new survey at all. The argument ignores or misconstrues the fact that the order of May 24, 1907, requiring an application to enter desert land to describe "the land with reference to the established lines of the original survey" was coupled with further explicit requirements that such description was "to be adjusted by legal subdivisions to the lines of the resurvey when established"; that the entryman after resurvey was to be required to show "the legal subdivisions of his claim," and that every such application was to bear an indorsement declaring it to be "subject to adjustment by legal subdivisions to lines of resurvey authorized by Act of July 1, 1902" (Record, pp. 141-142). Appellant's argument also ignores the opinion of the Secretary that "the required description, in an application, of land by the old survey was an impossible condition" (Record, p. 184; Hart *vs.* Cox, 42 L. D., 594).

(*dd*) The argument of the appellant goes so far as to deny that the lands of the Imperial Valley were accorded by the Department "the status of unsurveyed lands." He characterizes the decisions and orders of the Department on that subject as "certain loose language." See his brief,

pages 27-34, and elsewhere. We have pointed out above that regulations and decisions extending over a period of years declared the lands to have "the status of unsurveyed lands." Both courts below so found (Record, pp. 81-226). It is so stated in the opinion of the Assistant Secretary upon which Cox obtained a patent in this case (Record, p. 181). Moreover it is expressly admitted in *appellant's pleading* that "they were by the said Commissioner and by the said local land office regarded as having the status of unsurveyed lands" (Record, p. 51).

(*e*) The appellant entertains erroneous opinions about the attitude of the courts of California on the effect of the Act of Congress of July 1, 1902, providing for the resurvey of Imperial Valley lands. Thus in the said opening brief (p. 18), we are informed that "The California courts do not allow the genuineness of the old survey to be questioned" (Miller *vs.* Marchus, 171 Cal., 257). Nobody, so far as we discover, ever stigmatized the survey of 1856 in the Imperial Valley as absolutely *"fictitious"* except the counsel for the appellant in said case of Miller *vs.* Marchus, and those counsel were the same learned solicitors who conducted in the courts below the proceedings for Cox in the present case. It appears from the report of Miller *vs.* Marchus that defendant there denied "that any actual survey was made in Imperial Valley in 1856, and stigmatized the survey * * * as *'fictitious'* " (171 Cal., 258). The California Supreme Court did not agree with that contention, and its view in that particular is now cited by the appellant here (his opening brief, p. 18) as authority for the assertion that "The California courts do not allow the genuineness of the old surveys to be questioned." Obviously it is one thing to

question the "genuineness"—the sometime fact—of a survey, or to say that it is "fictitious," and quite another and different thing to say that it was incorrect, or that its lines have been effaced, or that it is superseded by a new survey.

What was decided in Miller *vs.* Marchus touching the Act of Congress of July 1, 1902, was that "the new survey superseded the old one," and that parties coming upon the land after the passage of that act would find that the lands they might lay claim to would be lands described by lines of the new survey and none other (171 Cal., 259).

Said case of Miller *vs.* Marchus follows and approves the previous case of Nichols *vs.* McCullum (169 Cal., 611). It was also approved later in the Matter of Scott (172 Cal., 363), where the same learned counsel who represented Cox in the present case in the courts below continued their attack on the original survey of 1856 as being "fraudulent and fictitious."

On a subsequent appeal in said case of Scott the Supreme Court of California restated its conclusion touching the effect of the Act of July 1, 1902 (32 Stats., 728), as follows:

> "In * * * providing for a resurvey of certain townships now situated in Imperial County, to cure the obliterations of the monuments of the original survey, the new survey supersedes the old one, and regulates the disposition of the public lands within the area affected as to all persons not in the actual occupancy of the land; and school sections which had passed to the State of California upon the approval of the old survey are governed, in respect of their boundaries, by the resurvey, *which absolutely controls*" (*Re* Scott, 182 Cal., 83, 85).

The reference by the words "actual occupancy" in this extract is to the proviso in said Act of 1902. It will be noticed that the California court assigns the motive for that statute, not to inaccuracies of the so-called "private retracements of the old surveys," as argued by appellant (his opening brief, pp. 2, 19), but to "obliteration of the monuments of the original survey."

(*f*) The case of Kendall *vs.* Bunnell in the District Court of Appeal, 2d District of California (205 Pac. Rep., 78), will be considered later in this argument.

What is said above concerning certain specific assertions of appellant on the subject under view must serve to indicate the general character of them all; all are, we submit, without merit; to particularize all of them would unnecessarily extend the present argument. It is respectfully submitted that the conclusions of the courts below touching the effect of said Act of March 28, 1908 (Record, pp. 82-3, 226), have not been and cannot be successfully impugned.

II.

The Act of March 28, 1908, Had Effect Whether It Be Deemed of Retroactive Nature or Not.

Appellant contends that plaintiff "would fail to show a legal right to the land superior to that of Cox even if the lands in question were unsurveyed July 17, 1907," because, he says, "the Act of March 28, 1908, section 1 (35 Stats., 52), is not retroactive" (opening brief, pp. 37-42).

The main reliance in this part of the appellant's argument seems to be on the presumption that statutes are intended by

the Legislature to have prospective operation. The rule itself is only one of construction; as has been held, "The result is that in all cases it is necessary to ascertain what the Legislature meant." Reynolds *vs.* Attorney General for Nova Scotia, L. R. (1896), A. C., 240, 244. Except in the instances where vested rights would be taken away, it is of course competent for Congress to pass statutes which have retrospective operation. There is not the slightest uncertainty, we venture to think, as to the time when Congress intended that the Act of March 28, 1908, should become effective—either as to its general purpose or the purpose of the proviso in section 1. It reads in part:

> "That from and after the passage of this act the right to make entry of desert lands under the provisions of the act approved March 3, 1877, entitled 'An Act to provide for the sale of desert lands in certain States and Territories,' as amended by the act approved March 3, 1891, * * * shall be restricted to surveyed public lands of the character contemplated by said acts * * *: Provided, however, that any individual qualified to make entry of desert lands under said acts who has, prior to survey, taken possession of a tract of unsurveyed desert land, not exceeding in area 320 acres in compact form and has reclaimed or has in good faith commenced the work of reclaiming the same, shall have the preference right to make entry of such tract * * * within ninety days after the filing of the approved plat of survey in the District Land Office" (35 Stats., 52).

The restriction of the right to make entry of desert lands is confined to *surveyed* public lands, "from and after the passage of this act;" that is plain. It is also plain that

the proviso for the protection of those who have "taken possession of a tract of unsurveyed desert land," etc., operates in their favor on "the filing of the approved plat of survey in the District Land Office;" at that time the "preference right" attaches in virtue of things *previously* done. In the present case said approved plat was filed February 23, 1909 (Record, p. 181).

Necessarily, the taking of possession and the reclamation or the commencing of the work of reclamation which give rise to "the preference right," are intended to be things done previously to the filing of the approved plat in the local land office; at that time the lands cease to be *un*surveyed, and become surveyed, public lands.

Therefore the argument of appellant reduces itself to this: That said act contemplated a "preference right" founded on things done—possession taken and reclamation, or the commencement in good faith of the work of reclaiming—only *after* the passage of said act; which is to say that nobody who took possession of a tract of unsurveyed desert land, *even if he had completely reclaimed it,* before the passage of the act would have any preference right under said proviso.

We respectfully claim that Congress intended nothing approaching such a degree of unreason; if that had been the design the appropriate words to give the "qualified individual" a preference right would have been, not *"who has,* prior to survey taken possession," etc., but "who shall, after the passage of this act," or "who *shall have* prior to survey taken possession." The past tense "has taken" is used, not the future, or the future perfect. The time meant is time past *before the passage of the act,* as well as time to elapse after its passage; there was more need of protection, under

said proviso, for those who took possession and in good faith reclaimed or began to reclaim unsurveyed desert lands *before* the passage of the act than for those who did such things *after* its passage; this is too plain for rational discussion, for the former class would naturally have relied on the provisions of the Act of March 3, 1877 (19 Stats., p. 377), that allowed the entry of both surveyed and unsurveyed desert lands.

Moreover the fact that the proviso was to operate on conditions existing at and before the time of its passage does not make it retroactive in any sense obnoxious to the presumption that statutes are to have only prospective effect.

A legislative act

> "is not properly called a retroactive statute because a part of the requisites for its action is drawn from time antecedent to its passing" (Queen *vs.* St. Mary, Whitechapel, 12 Q. B., 120, 127, per Lord Denman, C. J.).

A statute is not retroactive merely because

> "Its operation in a given case may be dependent upon an occurrence prior to its passage" (*In re* Scott, 126 Fed. Rep., 981, 984).
>
> "A statute does not operate retroactively from the mere fact that it relates to antecedent events" (Chicago, etc., R. R. Co. *vs.* State, 47 Neb., 549, 563; 53 Am. St. Rep., 557, 564).

Congress of course knew of the provision in the Act of 1877 (19 Stats., p. 377) allowing the entry of unsurveyed desert lands; that act is expressly mentioned in the Act of 1908; and knew the condition must have frequently occurred where a qualified individual had previously taken possession of 320 acres or less of unsurveyed desert land and had either re-

claimed, or in good faith had commenced to reclaim the same; and it is incredible that it could have intended to omit that class of entrymen from the effect of the proviso, which is an adaptation of the statute to existing conditions in order to prevent injustice.

Suppose that Cox, or any other person, had appeared, *for the first* time as a claimant for this land on March 1, 1909 (which was the date of Cox's second application to make entry of the land), could he have had the slightest standing to assert his right against her because she had taken possession and begun the work of reclamation before, instead of after March 28, 1908? If not, then it can make no difference, as regards the time when said proviso became operative, that Cox was a rival pretender to the lands before the passage of the act; there is no intimation in the statute that the proviso should be limited to "an individual qualified who is *unopposed* in his efforts to effect reclamation," etc.; the existence of conflicting claims is not made a qualification of the said proviso or declared to be any obstacle to its effect. The only effect of a previous conflict was to render necessary the determination of the *question which of the contending claimants was entitled to the benefit of the proviso.*

And it is obvious that the argument for the appellant that alleged retrospective effect is allowed said proviso in the Act of 1908, should the appellee's view of that statute be upheld,—is, *if good for anything, good for entirely too much;* for if the statute has no effect to protect Miss Hart, or any one in her situation as a possessor and reclaimer of desert lands *before* March 28, 1908, as against some *prior* intruder like Cox, then also it was equally ineffective to

protect her, or any entryman under similar conditions, against a new and previously unheard-of claimant first asserting a claim *after* the filing of the plat of the survey in the local land office.

Suppose it were conceded that the proviso in section one of the Act of March 28, 1908, is of retrospective character, such concession would make no difference; for the law favors statutes *that have that kind of retrospect.* In the decision of the Commissioner of the General Land Office the opinion of the Commissioner was expressed as follows:

> "It seems that when Congress passed the Act of March 28, 1908, it intended to protect the rights of persons in the condition [in which] Miss Hart is situated. After this act had been passed, this office repeatedly held that its effect was retroactive, not in a limited sense, not in part, as held by you, but in a broad and common-sense view of giving effect to the clear intention of Congress and protect those who had commenced the reclamation of unsurveyed lands, not exceeding 320 acres in extent, from all intruders upon any part of said tract until they had opportunity to reclaim the same, and for this purpose a preference right was given" (Record, pp. 76-77).

The District Court below adopted that opinion, and we submit it to be a just and reasonable commentary on the effect of the statute; but we do not agree that it can properly be considered a retrospective statute at all.

A State Constitution forbidding the making of "retrospective laws" has its proper scope in the prevention of *ex*

post facto laws, and those impairing the obligation of contracts; but does not apply to

> "laws made for the preservation or establishment of just rights and titles, which have become imperfect and infirm due to the non-observance of some legal ceremony, for those laws are not to take away rights but to confirm and establish them." Bell *vs.* Perkins Peck, 261, 267, 14 Am. Dec., 745.

This Court has rendered many decisions of similar tendency. It seems hardly necessary to cite them but we will mention, McFadden *vs.* Evans-Snider-Buel Co., 185 U. S., 505, 513; Ewell *vs.* Daggs, 108 U. S., 143, 150-1; Louisiana *vs.* New Orleans, 109 U. S., 285; with which may be compared, State of New York *vs.* Foster, 133 N. Y. Sup., 152, 154-5, and cases cited; affirmed 205 N. Y., 593.

III.

Appellant had No Vested Rights in the Land to Prevent the Effect of the Proviso in Section One of the Act of March 28, 1908.

There are sundry intimations in the brief for appellant (p. 37 and elsewhere) that to allow the said proviso to create a "preference right" in favor of Miss Hart is to take away some vested right of the appellant. That statute certainly did not affect any privilege of Cox to show that his right, if he had any, was better than the right of the appellee. *If,* under said proviso, *he had a superior claim to a "preference right,"* it was in no way diminished by the statute.

But Cox never acquired any vested right in the land in dispute. The most that can be said in his favor is that before the passage of the Act of March 28, 1908, he was trying to do what the appellee *first* began to do, viz., initiate a claim under the desert-land laws to lands which she first possessed and first began to reclaim.

> "It is not intended by a vested right that it shall be a right to do wrong," Tate *vs.* Stooltzfoos, 16 Serg. & R., 35, quoted with approval in Dentzel *vs.* Waldie, 30 Cal., 139, 145.

But, further, Cox had done nothing at or previously to the time of the passage of the Act of March 28, 1908, to acquire any vested right in the land. He had, on July 17, 1907, filed in the District Land Office an application to enter the land (which application was insufficient and invalid, a matter we shall hereafter consider at length); such application was rejected by the Register and Receiver on July 23, 1907; he appealed to the Commissioner of the General Land Office who, on October 3, 1910, affirmed the action of the Register and Receiver, and from such decision of the Commissioner, Cox took no further appeal (Record, pp. 17-18, 53-54, 68, 162). *Cox had never paid or offered to pay the sum of 25 cents an acre, required by the terms of the Act of March 3, 1877* (19 Stats., p. 377).

His possession of the land was obtained by wrongful intrusion, and with knowledge that it was to be resurveyed under the Act of July 1, 1902; and notwithstanding that he had possession for two years and until he was ejected by the sheriff, yet it was proved and is conceded that he did not at any time conduct any water upon the tract and that "he did

not at any time irrigate or cultivate any part thereof or at any time plant, raise, or produce any crop or crops of any kind thereon" (Record, p. 102). Manifestly, we maintain, he had no such relation to the paramount title of the United States as could prevent the full effect and operation of the proviso in Section 1 of the Act of March 28, 1908, in favor of the plaintiff. As said by the Supreme Court of California:

> "Public lands are under the exclusive control of Congress, until title or a right to acquire title has, pursuant to some law, vested in some person or body corporate other than the United States."
>
> Nichols *vs.* McCullom, 169 Cal., 611, 614,

quoted with approval by the Circuit Court of Appeals below. (Cox. *vs.* Hart, 270 Fed. Rep., 51, 54.)

Since, therefore, Cox had not performed all, or indeed any, of the preliminary acts prescribed by law, including payment of a part of the price of the land, he was in no such privity with the title of the Government as affected the right of Congress to change or modify or entirely withdraw the provisions of the desert-land law he sought to misuse for the spoliation of the plaintiff. There was no contract and nothing in the nature of a contract between him and the Government and he had no vested rights.

Frisbie *vs.* Whitney, 9 Wall., 187, 196-7.
Yosemite Valley Case, 15 Wall., 77, 93-94.
Hosmer *vs.* Wallace, 97 U. S., 575, 581.
Emblen *vs.* Lincoln Land Co., 184 U. S., 660, 664.
Banning *vs.* People, 240 U. S., 142, 151, and following.
Klauber *vs.* Higgins, 117 Cal., 451, 459.
Norton *vs.* Evans, 82 Fed. Rep., 804.

IV.

THE APPELLEE HAD ACTUAL POSSESSION OF THE LAND IN SUIT AT THE TIME OF, AND LONG PRIOR TO, THE ATTEMPT OF THE APPELLANT TO INITIATE A CLAIM THERETO. SUCH CLAIM BY HIM WAS BEGUN BY TRESPASS ON HER POSSESSION. UNDER THE RULE OF ATHERTON V. FOWLER (96 U. S., 513) AND NUMEROUS OTHER CASES HE ACQUIRED NO LEGAL RIGHT AGAINST HER.

These facts made her applications to enter the land, of July 30, 1907, and May 15, 1909, respectively (Record, pp. 86, 92), superior to his even if the Act of March 28, 1908, does not protect her.

In the statement of facts introductory to this brief we have indicated the evidence and grounds upon which it was held by the General Land Office, as well as by both courts below, also by the Supreme Court of California, that plaintiff had the actual possession of the land in dispute, and that Cox unlawfully intruded upon the same, and ousted her November 8, 1906; and withheld such possession from her until by process of the State court in which she sued to recover such possession it was restored to her in March, 1909.

We do not understand at all that the Secretary, deciding that Cox was, and that Miss Hart was not, entitled to enter the land (Record, pp. 79-80, 181-85) at all controverted these facts. He ignored them. The meaning to be extracted from his decision is, so far as we can see, that it made no difference whether Miss Hart had possession of the land or not; it seems necessarily to follow from the view of the Honorable Assistant Secretary that if she had reclaimed it all and ir-

rigated every square inch of it, Cox, nevertheless, had the right to take it away from her.

Still it seems not improper, and it may be convenient, to summarize somewhat at this place the decisions of the several tribunals which have investigated this subject.

It is important to be kept in mind that her possession was (*as held by all the said tribunals*) *of the entire* 320-*acre tract claimed by her,* and that her possession and rights of possession were not to be differentiated between the part of the tract which was "jumped" by Cox and the part which he refrained from invading.

Among the instructions given by the court to the jury, elaborated and explained by the court in various ways, and on which the jury *returned a verdict* in favor of the plaintiff and against Cox, in the action she brought against him in the Superior Court of Imperial County, California, was this:

> "The possession which is necessary for the plaintiff to show in an action of this kind is an actual possession as distinguished from constructive possession; * * * in order to constitute possession, land must be either enclosed or put to the use to which such land is ordinarily put in the neighborhood. Getting ready to put the land to such use is insufficient, unless the work done in getting ready is done on the land and is notorious and uninterrupted and appears upon the land" (Record, pp. 107-110-11).

From the judgment in that court adverse to him Cox appealed to the Supreme Court of the State. The evidence taken up to the Supreme Court in the case regarding the possession by plaintiff of the entire 320-acre tract is shown in the record here at page 116 and in the report of the case

(171 Cal., 364) to have been substantially the same as that before the District Court in the present cause. Commenting upon it the Supreme Court said, among other things:

> "In determining the sufficiency of acts to constitute possession of a given piece of real property the courts have taken into consideration the character of the land, its locality, and the customs of the community. * * * It is sufficient if the land is occupied and used in the same manner that owners of land of like character in that vicinity usually occupy and exercise dominion over their property. * * * True, plaintiff did not establish the fact that she had actually placed improvements upon every acre of the land comprising the 320 acres which she claimed. But she was proceeding in the *usual and orderly manner to subjugate and cultivate* the tract which she had caused to be marked out. * * * The evidence sufficiently shows that plaintiff had entered upon the property and was taking the usual means of improving it. She had exercised frequent acts of ownership in the parts not cultivated, all of which gave notoriety to her possession. The process of improvement extending from the highest point on the tract to the land immediately adjacent and the preparations to extend the area to be subject to irrigation were in accordance with the usual course of husbandry in the locality, and were sufficient to establish plaintiff's superior right to the land." Hart *vs.* Cox, 171 Cal., 364, 367-8.

Many authorities were cited by the court, and the case was certainly well-considered there. The court observed, citing several decisions, that the acts of plaintiff,

> "must be viewed with reference to her general plan for improving the entire tract" (171 Cal., 370).

The conclusions of the General Land Office on the question of fact touching the possession had by the plaintiff were substantially the same as that of the said jury, and was stated at some length in the opinion of the Assistant Commissioner (Record, pp. 175-178), adopted by the district court below (Record, pp. 73-77); the Circuit Court of Appeals was of the same opinion. It said:

> "The appellant contends that the appellee was not a settler on the land in controversy and that the acts which she performed thereon gave her no right thereto at the time when he made his residence thereon and filed his first application, and that the filing of that application on July 17, 1907, was the first act of anyone to create a right to the land. But [said the Circuit Court of Appeals] the land was not then vacant and unoccupied. In the Land Department it was found that the appellee in 1906, in good faith, commenced the work of reclaiming the land in dispute before the entrance of the appellant thereon" (Record, pp. 225-226; 270 Fed. Rep., 53).

The semblance of an argument set up by the appellant here at pages 8, 9, 44, 45 and perhaps elsewhere in his opening brief, that he was not a trespasser on the prior possession of the appellee, is a denial of the fact established by the findings and decisions above described.

In Gauthier *vs.* Morrison, 232 U. S., 452, the plaintiff had settled upon certain unsurveyed land in the State of Washington intending to acquire title to the same as a homestead. The defendant ousted him of his possession and withheld the tract from him. He brought an action in the State court of original jurisdiction to recover possession and that court de-

clined to interfere. On appeal the Supreme Court of Washington affirmed the judgment on the supposed ground that the State courts had no jurisdiction (232 U. S., 456-8). The case came to this court on writ of error prosecuted by the plaintiff and the decision of the Supreme Court of Washington was reversed. This court, per Mr. Justice Van Deventer, said among other things:

> "It was not a survey, but the right of possession under an inceptive homestead claim that was in question * * *. Congress has not prescribed the forum and mode in which such wrongs may be restrained and redressed, as doubtless it could, but has pursued the policy of permitting them to be dealt with in the local tribunals *according to local modes of procedure* and the exercise of this jurisdiction has been not only sanctioned by the appellate courts in many of the public-land States, but also recognized and approved by this court. [Citing many cases.] It was well said by the Supreme Court of Oklahoma in Sproat *vs.* Durland [2 Okla., 24, 25]: 'To say that no relief can be granted, or that our courts are powerless to do justice between litigants in this class of cases pending the settlement of title in the Land Department would be the announcement of a doctrine abhorrent to a sense of common justice. It would encourage the strong to override the weak; would place a premium upon greed and the use of force and in many instances lead to bloodshed and crime. * * * The courts should not hesitate to invoke the powers inherent in them and lend their aid, in every way possible, in aid of justice by preventing encroachments upon the possessory rights of settlers or by equitably adjusting their differences.' We are accordingly of opinion that * * * the court of

> first instance * * * should have proceeded to an appropriate disposition of the asserted right of possession" (232 U. S., 461-2).

Quoted with approval in Ridpath *vs.* Denee, 85 Wash., 326-7.

A similar decision was reached in Northern Pacific Railway Co. *vs.* McComas, 250 U. S., 387.

Since therefore the courts of California had jurisdiction of the controversy brought by the present appellee against the appellant to recover the possession of which he had ousted her, both as to the subject matter and the parties, their judgment estops the defendant from questioning the fact that he was an intruder and a trespasser.

Even if that were not so, yet the facts as found and determined by both courts below that the plaintiff had actual possession and had commenced in good faith the reclamation of the entire tract claimed by her will be, as we understand the law of this court, the same as other facts determined by those courts, accepted as conclusive here.

> "The rule is well settled that findings of fact concurred in by two lower courts will not be disturbed by this court unless shown to be clearly erroneous."
>
> Texas & Pacific Ry. Co. *vs.* R. R. Commission, 232 U. S., 338, 339.
>
> Dun *vs.* Lumbermen's, etc., Association, 209 U. S., 20, 23.
>
> Page *vs.* Rogers, 211 U. S., 575.
>
> Washington, etc., Co. *vs.* United States, 234 U. S., 76, 78.

It seems unnecessary to mention the "deference" and "high consideration" accorded to the conclusions of fact announced by the trial court, but we will cite

United States *vs.* United Shoe, etc., Co., 247 U. S., 32, 37.

Adamson *vs.* Gilleland, 242 U. S., 350, 353.

Davis *vs.* Schwartz, 155 U. S., 631, 636.

For reasons similar to those we have been considering the fact is further established beyond the possibility of controversy in this court that the plaintiff had *in good faith* commenced the work of reclaiming the tract of land in dispute. The evidence we have set out shows it. The decision of the Supreme Court of California in Hart *vs.* Cox, 171 Cal., 364, 367-8, 369-70, is at least a precedent and an authority for that conclusion; and it is found as a fact by the decision of the Commissioner of the General Land Office (Record, pp. 174, 175, 177, 178), and by the District Court below in this cause (Record, pp. 67-79), and by the Circuit Court of Appeals (Record, pp. 225-6).

In Atherton *vs.* Fowler, 96 U. S., 513, one Page, whose executor Atherton was, had possession of a body of more than 800 acres of land, which was fenced and cultivated, deraigning right to the same under a supposed grantee of the former Mexican Government in California. The grant failed.

Defendants entered upon the land, claiming the right to pre-empt the same as unsurveyed lands of the United States (96 U. S., 514, 517, 518). The principal things required

of a pre-emptor were to settle on the land, to inhabit and improve it, and erect a dwelling house thereon (U. S. Rev. Stat., Sec. 2259). This court said:

> "The generosity by which Congress gave the settler the right of pre-emption was not intended to give him the benefit of another man's labor, and authorize him to turn that man and his family out of their home. It did not propose to give its bounty to settlements obtained by violence at the expense of others. The right to make a settlement was to be exercised on unsettled land; to make improvements on unimproved land; to erect a dwelling house did not mean to seize some other man's dwelling. It had reference to vacant land, to unimproved land; and it would have shocked the moral sense of the men who passed these laws, if they had supposed that they had extended an invitation to the pioneer population to acquire inchoate rights to the public land by trespass, by violence, by robberies, by acts leading to homicides, and other crimes of less moral turpitude" (96 U. S., 519).

We respectfully urge that the reasons which underlie the decision in Atherton *vs.* Fowler, and the numerous other cases of which it was the forerunner, are equally cogent against the pretensions of appellant in the case here. The desert land statutes imperatively require *possession* by the person undertaking to reclaim desert land. By the Act of March 3, 1877 (19 Stats., p. 377), the desert land entryman is required to make oath of his intention to reclaim a tract of desert land *by conducting water upon the same.* By the amendatory Act of March 3, 1891 (26 Stats., 1906), the entryman is required to file with his declaration a map ex-

hibiting a plan of the contemplated irrigation "sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops," and it is further provided that no land shall be patented to any person under the act

> "unless *he or his assignors* shall have expended in the necessary *irrigation, reclamation, and cultivation* thereof, by means of *main canals and branch ditches,* and in permanent improvements upon the land, and in the purchase of water rights for the irrigation of the same, at least $3 per acre of the whole tract," etc.

Within one year after making entry he is required to expend not less than $1 per acre "for the purposes aforesaid," etc., with a proviso,

> "That proof be further required of the cultivation of one-eighth of the land."

Within the period of four years after the declaration "upon making satisfactory proof * * * of the *reclamation and cultivation* of said land *to the extent* and cost *and in the manner aforesaid,*" etc., the entryman becomes entitled to a patent (26 Stats., pp. 1096-7).

The entryman or his assignors must expend the sum specified, and do the things specified, in and about the irrigation, reclamation, and cultivation of the land by means of main canals and branch ditches and in permanent improvements and the cultivation of at least one-eighth of its surface. *Residence* on the land by the claimant is not required, but none of the things which *are* required to be done on the land can be performed *without actual possession* of the land and the continuing *exercise of acts of ownership and control* upon the same. The purpose of this legislation

is to *reclaim* the desert lands of the Government from their arid, waste, and desert condition to a state of productivity by means of the application of water, and by the exertion of individual enterprise, excluding any approach to land monopoly.

In Chaplin *vs.* U. S., 114 C. C. A., 93; 193 Fed Rep., 879, the question related to fraud upon the United States by means of false declarations by ostensible entrymen of the purpose to reclaim desert lands. The defendants were convicted and on appeal to the Circuit Court of Appeals that court said, among other things:

> "It was clearly not the intention of Congress to offer the desert lands to entry to persons who were to be dummies for others, or to persons who had no intention *to occupy* the land for the purposes for which it was offered * * *. Why does the Act of Congress require the entryman to take the solemn oath that he intends *to reclaim* the land, unless that intention is of the very essence of the condition upon which his entry is permitted? He certainly cannot be said to intend to reclaim through the future acts of his assignee. * * * Desert lands are not offered to settlers for speculation, nor for what money they will bring to the Government, but *they are offered to settlement* by Congress in the exercise of authority to provide for the common welfare, and in the discharge of a duty to develop the agricultural resources of the United States."
>
> 193 Fed. Rep., 881-82.

A writ of certiorari to review that decision was refused by the Supreme Court (225 U. S., 705).

The Supreme Court of California remarked, speaking of the desert land statutes:

> "The central idea and the whole policy of the Government, in dealing with these arid lands, was to *secure their reclamation* upon moderate terms for the benefit of the country."
>
> Phillips *vs.* Carter, 135 Cal., 604, 608.

Possession—occupancy—physical control of the land, by the entryman, is therefore clearly the purpose of Congress, for otherwise he could not effectuate its reclamation.

Of course the appellant and the appellee could not, adversely to each other, reclaim the same land at the same time, and the law never contemplated that they should attempt to do so; the fact was that Cox, after he intruded upon the land in the possession of the plaintiff, "tore down" some of the improvements she had constructed for the purpose of reclamation (Record, p. 76). Obviously, acts of that nature, and those of more serious tendency to excite strife, are just as likely to occur when the possession of an occupant claiming a right to make a desert land entry is invaded by another person as in the case of the intrusion described in Atherton *vs.* Fowler (96 U. S., 514), and other cases we shall presently mention.

In the present case the appellee did not oppose the aggression of appellant with physical force; she successfully applied to the courts for protection against him; but that circumstance does not affect the principle of the thing, or add to the merit of appellant's procedure.

The conditions in the Imperial Valley disclosed by the record made that region peculiarly appropriate for the application of the rule of Atherton *vs.* Fowler, designed as it was (if we may use language that has had the approval of this court) to condemn a contrary practice that

> "would encourage the strong to override the weak; would place a premium upon greed and the use of force, and in many instances lead to bloodshed and crime."
>
> Gauthier *vs.* Morrison, 232 U. S., 462.

To the detail of those conditions elsewhere given we will ask attention to only the further illustration afforded by the instructions of the Commissioner of the G. L. O., January 18, 1910, to Satterwhite, special agent (Record here, pp. 147-8), relating mainly to a plan for the disposition of the accumulation of appeals, said to have been for the most part "from two to four years" old, in contests arising in the Imperial Valley out of conflicting surveys and means of attempted identification of the lands which were the subject of the respective appeals. Those appeals, beginning at least as early as the year 1904, included six or seven different classes of description, to wit: applications in which the lands applied for were described "according to the original government survey of 1856 *as near as possible*"; descriptions "by metes and bounds"; descriptions "by the lines of the 'Imperial survey' "; by the lines of the so-called " 'Sunset survey' "; by the lines of the Government's resurvey while the same was in progress; by the lines of some of those surveys *plus* "metes and bounds" (Record, pp. 147-8 and following).

In that state of affairs, *it is apparent that bona fide pos-*

session and occupancy with intent to reclaim under the law stood in as great need of protection, and the rule of Atherton *vs.* Fowler, and similar cases to be hereafter cited, was as necessary for the prevention of public disorder and private injustice, as it ever was elsewhere, probably, in any part of the public land States.

We return to the consideration of sundry classes of the public lands to which the principle of Atherton *vs.* Fowler has been considered to be a proper rule of administration.

Firstly, that principle was and is yet *the rule of procedure adopted by the Land Department itself* in the disposition of desert lands, and Cox was successful in obtaining the patent we complain of *only by the violation of such rule of procedure.*

When Cox made his application for the land in dispute on July 17, 1907—an application which, although rejected by the Department, was yet made the foundation for the patent subsequently issued to him (opinion of the Assistant Secretary, Record, pp. 184-5)—he was required by the rules of the Department to make an affidavit, *and he did falsely make such affidavit,* that the land had theretofore *"been unappropriated, unoccupied and unsettled."* By the terms of the original desert land act of March 3, 1877 (19 Stats., 377), desert lands were defined to be "all lands exclusive of timber lands and mineral lands, which will not, without irrigation, produce some agricultural crop"; and it was provided that "the determination of what may be considered desert land shall be subject to the decision and regulation of

the Commissioner of the General Land Office." Certainly, under these provisions, it was competent for the Commissioner of the General Land Office to adopt regulations that would prevent lands which were already reclaimed and irrigated, or in process of such reclamation, from being considered as desert lands subject to entry; it was equally competent for him to promulgate regulations which would prevent the entry of lands, "appropriated, occupied and settled" by a claimant in good faith, proceeding with the work of reclamation, from being classed as desert lands subject to entry. Accordingly, the Commissioner of the G. L. O., as early as June 27, 1887, if not earlier, did promulgate regulations upon this subject; addressing Registers and Receivers generally, he said,

> "Your attention is called to the terms of this declaration [required of an intending entryman] provided by existing regulations (form 4-274), which are such as require a personal knowledge by the entryman of lands intended to be entered. * * * And you will hereafter reject all applications in which it does not appear that the entryman made the affirmations contained in the sworn declaration upon his own knowledge derived from a personal examination of the lands" (5 L. D., 708-710).

This matter was the subject of the first evidence introduced at the trial of this case in the District Court below (Record, pp. 84-5). It was there shown relative to the said form 4-274 that among the things required to be stated by the desert land applicant was,

> "that said land has *hitherto been unappropriated, unoccupied, and unsettled* because it has been impossible to cultivate it successfully on account of its dry and arid condition;"

and that Cox, when he made his application, July 17, 1907, made oath to precisely that statement relative to the land in controversy (Record, pp. 84-85).

It is clear, therefore, that the Department understood and construed the desert land acts as subject to the like qualification that was declared by this court in Atherton *vs.* Fowler, relative to the former pre-emption statute; and that the right to make entry of desert land and to irrigate it, and reclaim it, is to be exercised by the applicant only on lands which are at the time of his desert land application *"unappropriated, unoccupied and unsettled"* by another who is in actual possession thereof and proceeding in good faith to bring water on, irrigate, cultivate and reclaim it.

At the time that Cox made the false affidavit just mentioned *the fact was,* as determined by the Supreme Court of California, and as found by the courts below in the present case, that the plaintiff

> "was proceeding in the usual and orderly manner to subjugate and cultivate the tract [320 acres] which she had caused to be marked out. The evidence sufficiently shows that the plaintiff had entered upon the property and was taking the usual means of improving it. The process of improvement extending from the highest point on the tract of land immediately adjacent and the preparations to extend the area to be subject to irrigation were in accordance with the usual course of husbandry in the locality and were sufficient to establish plaintiff's superior right to the land" (Hart *vs.* Cox, 171 Cal., 364, 368; Record, p. 76, and elsewhere).

We think it apparent that said regulations of the General Land Office and the form of affidavit required of a declarant,

to which Cox made oath as above stated, are a clear index to the meaning of the Act of March 3, 1877 (19 Stats., 377). We maintain that they are, to use the language of the Court of Appeals for the Ninth Circuit, relating to certain other regulations for the disposal of the public lands

> "reasonable, and evidently were intended and are well calculated to carry into effect the intent and true meaning of the act of Congress. They are proper within the limitations of the law for the enforcement of which they were promulgated, and should be complied with" (Cosmos Exploration Co. *vs.* Gray Eagle Oil Co., 112 Fed. Rep., 4, 11-12; 50 C. C. A., 79; affirmed on appeal to this court, 190 U. S., 301, 309).

Those rules and regulations were not only valid and lawful, but they were binding upon the officers of the Department. The decision of the Secretary ignoring or derogating from or disregarding the same, was nothing more than an erroneous judgment.

> James *vs.* Germania Iron Co., 46 C. C. A., 476; 107 Fed. Rep., 597-598, 602, 603, 609, 610.

> "The Commissioner of the General Land Office has authority to make regulations respecting the disposal of the public lands, and such regulations, when not repugnant to the acts of Congress, have the force and effect of laws."
>
> Poppe *vs.* Athearn, 42 Cal., 606, 609; to the same effect, United States *vs.* Smull, 236 U. S., 406.

So much for the meaning attributed by the Land Department to the statutes of March 3, 1877, and the regulations

adopted to prevent the entry of any desert land which is not "unappropriated, unoccupied and unsettled" (Record, pp. 84-85). We respectfully contend that they are conclusive against the appellant.

Next we shall look to the analogy afforded by the law respecting the acquisition of the right of homestead on the public lands. The amendatory section 7 added, with others, in the year 1891, to the Desert-land Act of 1877, explicitly provides,

> "that the claims or entries made under this or any preceding act shall be subject to contest, as provided by *the law relating to homestead cases, for illegal inception,*" etc. (26 Stats., 1097).

Thus the Act of Congress itself subjects *the inception* of desert land claims to contest under like circumstances, so far as in their nature they are applicable, which attend the entry of land for homestead purposes.

Under section 2289 R. S., as amended by the Act of March 3, 1891 (26 Stats., 1098) and following sections, every head of a family or person above 21 years of age having certain specified qualifications is entitled to enter as a homestead a quarter section or less of unappropriated public lands. His procedure, as defined in section 2290, is to file in the proper land office an affidavit stating certain matters —among them that his application is made for the purpose of actual settlement and cultivation, and that he will comply with the requirements of law as to settlement, residence, and cultivation necessary to acquire title; whereupon on making certain small payments he becomes entitled to enter the

amount of land specified. Unlike the right of pre-emption, the homestead right was initiated by the entry—prior to the Act of May 14, 1880 (21 Stats., 141, sec. 37), which allowed the homesteader to settle first and file afterwards; Sturr *vs.* Beck, 133 U. S., 541, 549; St. Paul, etc., Ry. Co. *vs.* Donahue, 210 U. S., 21, 31. While the homesteader is required to take possession of and make his home on the land and to reside on and cultivate the same, he is allowed 6 months after the entry in the Land Office to begin actual residence on his claim.

McLemore *vs.* Express Oil Co., 158 Cal., 559, 565, and authorities there referred to.

Actual possession, occupation, and cultivation of the land is as necessary for the homestead claimant as it was for the pre-emption claimant—or as it is for the desert land claimant; the requirements of actual reclamation and improvement are as peremptory upon the desert land claimant (26 Stats., pp. 1096, 1907) as are the requirements of settlement and cultivation upon the homestead claimant. (R. S., 2289-90-91.)

It is well established that the rule of Atherton *vs.* Fowler, 96 U. S., 513, restricting the right to make settlements, to unsettled land, and the right to make improvements to unimproved lands, etc., is as authoritative in the case of homestead entries as it was in the case of pre-emption entries.

In Lyle *vs.* Patterson, 100 C. C. A. 279; 176 Fed. Rep., 909, the defendant Patterson claimed the land in dispute as a "good-faith purchaser" thereof from a certain grantee of a railroad company to which the legal title had passed in virtue of certain Federal and State legislations designed to

promote the construction of railways. Lyle, the plaintiff, claimed as a homesteader, but it appeared that when he "entered upon said land with a view of making a homestead settlement, he knew of the occupation and possession by the defendant Patterson, of his improvements thereon, and of his claim of ownership of said land." For the purpose of the decision, the court assumed that Patterson was not entitled to acquire the land under the Act intended to protect "good-faith purchasers" from the railroad company. The court said:

> "If it be assumed for the sake of the argument that Patterson was not entitled to acquire this land under the Congressional Act of March 3, 1887, yet his possession was not *mala fides*. It was obtained and held under such a state of facts that no one but the United States could question his right thereto. Under such circumstances, *complainant's entry upon the lands was that of a mere trespasser, and as such he acquired no rights under the homestead laws.* In Atherton *vs.* Fowler, 96 U. S., 513, * * * the court said: 'Among the things which the law required of a pre-emptor, and the principal things required of him to secure his right, were: (1) To make a settlement on the land in person. (2) To inhabit and improve the same. (3) To erect a dwelling house thereon.' These things were also principal requirements of the homestead law. Harvey *vs.* Holles (C. C.), 160 Fed., 531." (176 Fed. Rep., 915-16.)

The case was appealed to this court and the judgment was affirmed, the history of the case being more succinctly related than in the C. C. A. The court here said:

> "This prior possessory title was good against all except the United States; *and Lyle's entry was a tres-*

* Dunce v. Ankeny, 246 U.S. 208, 213-14.
Fisher v. Rule, 248 U.S. 34.

pass. It neither gave nor initiated any right in the property. The fact that by the threats and violence of another trespasser, he was prevented from continuing his forcible entry and detainer, deprived him of no right in the land, though it does illustrate what would be the result if possession secured by violence and maintained with force and arms could furnish the basis of a right enforceable in law. Such a claim, originating in trespass, cannot be recognized, for 'to create a right of pre-emption there must be settlement, inhabitation, and improvement by the pre-emptor, conditions which cannot be met when land is in the possession of another.' Hosmer *vs.* Wallace, 97 U. S., 575, 579. *This is equally true of the initiation of the homestead right by settlement.*" (Lyle *vs.* Patterson, 228 U. S., 211, 216.)

There are many other decisions which liken a homestead entry, in the particular we are considering, to the entry under the former statute relating to pre-emptions. Some of them are cited below.

The argument for appellant claims some virtue and merit for him on the alleged ground that he "did not enter home land of Ethel Hart in trespass." It is said that he "entered in broad daylight" (his opening brief, pages 44-45). The case does not show whether he entered in day time or night time; it *does* show that his entry on the land was "during her temporary absence, * * * without her consent, and against her will" and that he ousted plaintiff from her possession and unlawfully withheld the possession until he was ejected by legal process, and that whatever attempts he made to enter the land by filings in the land office were made while he unlawfully withheld the possession. There

is no dispute about these facts (Record, pp. 10, 74, 105-6, 116, 164-4). The material inquiry is whether the possession which he wrongfully took was an invasion of her actual possession; that it was is conclusively established, as we have pointed out; *sole* possession was necessary to a claimant in order that he might do those things required by the desert land laws for the reclamation of the land. We cite here some further authorities:

> "A settlement cannot be made upon public land already occupied; as against existing occupants, the settlement of another is ineffectual to establish a pre-emptive right, * * * but a settlement upon a portion of a quarter section, and making the improvements required by law, will sustain a pre-emptive claim to the whole quarter section as against subsequent settlers." * * * (Quinby *vs.* Conlan, 104 U. S., 420, 423.)

In Sullivan *vs.* Damon, 202 Fed. Rep., 285, the complainant claimed the land as a homesteader; the claim of the defendants was in virtue of a purchase from a land grant railroad company whose title failed. The ancestor of the defendants had possession of the land in virtue of his contract with the railroad company. Plaintiff based his claim upon attempts he had made to settle upon the land. The court said:

> "But at that time Damon had been in the actual possession of the land for some seven years, had broken up more than 60 acres of it, and had cultivated it either in person or by tenant during all of those years, claiming it under his contract of purchase with the Railroad Company";

and that the case was controlled by Harvey *vs.* Holles, 160 Fed. Rep., 531; and other cases of similar impression.

In Rourke *vs.* McNally, 98 Cal., 291, the plaintiff was in possession of certain public land; the defendant made a settlement thereon by building a house, etc., "intending to enter the same and the adjoining land, not exceeding 160 acres, as a homestead under the laws of the United States. * * * She broke no fence, and her entry was without force or violence. Her entry, however, was without the knowledge or consent of the plaintiff and against his will, and she has ever since kept him out of possession." The court said:

> "Since she entered upon the actual possession of another, *it is of no moment that her entry was peaceable, because made in the absence of plaintiff;* nor is it of consequence that she intended to take up the land as a homestead. * * * The laws of the United States do not authorize an entry upon the actual possession of another * * * although such entry is made with the intent to acquire the title in some lawful mode," (citing Atherton *vs.* Fowler, 96 U. S., 513, and a number of other cases). (98 Cal., 292.)

In Goodwin *vs.* McCabe, 75 Cal., 584, the plaintiff had prior actual possession—or at least he claimed to have been in the prior actual possession—of the land in dispute. The defendant McCabe, after making homestead entry under the laws of the United States, had taken possession of the land but without the use of force. The court commented upon this feature of the case as follows:

"In Quinby *vs.* Conlan, 104 U. S., 423, the rule was stated to be that 'a settlement cannot be made upon public land *already occupied.*' The element of force was not adverted to. In Mower *vs.* Fletcher, 116 U. S., 381, the court said that if a party enters into possession of the land and improves and cultivates and holds it, no one, by forcibly or *surreptitiously* getting into possession, can make a preemption settlement, etc. And the reasoning of the court [the Federal Supreme Court] in all cases seems to us to forbid the invasion of the actual possession of another, whether such invasion is accompanied by the use of force or not." (75 Cal., 588.)

Goodwin *vs.* McCabe, 75 Cal., 584, 588; Rourke *vs.* McNally, 98 Cal., 291; McBrown *vs.* Morris, 59 Cal., 64; Trenouth *vs.* San Francisco, 100 U. S., 251, and a number of other cases, were referred to by this court as authorities, and with apparent approval, for the proposition that *"no right can be initiated on Government land* by a forcible, *fraudulent or clandestine entry* thereon." Clipper Mining Co. *vs.* Eli Mining & Land Co., 194 U. S., 220, 231.

In the case last cited—where the question involved was the right of claimant of mineral land to enter upon a placer claim in the possession of other persons and there prospect for unknown lodes—this court said:

"The difficulty with the case presented by the plaintiff in error is, that under the findings of fact, we must take it that the entries of the locators of these several lode claims upon the placer grounds were trespasses, and as a general rule no one can initiate a right by means of a trespass." 194 U. S., 230, citing Atherton *vs.* Fowler, 96 U. S., 513, and other cases.

From the foregoing discussion and the authorities referred to, it is entirely apparent, we humbly submit, that even if we allow what the appellant so much insists upon, that the right to enter the land in question could be initiated only by the filing of a declaratory statement, it can make no difference in the application of the rules illustrated by the foregoing cases; for allowing that Cox could have filed either one of the declaratory statements without going on the land, yet the fact is that he did not do so, but, on the contrary, first unlawfully possessed himself of the land; but (and this we consider yet more important) he could not reclaim the land by bringing water upon it or give it the requisite cultivation and improvement, which things were necessary to be done by him, without that conflict of physical occupancy which the law upon this subject was designed to prevent.

In view of the considerations above advanced, certain statements of appellant's brief touching his intrusion on the possession of the appellee are not important, but they are characteristic of the inaccuracy of narration in said brief, and possibly we ought to comment on them. Appellant says:

> "On November 8, 1906, Cox established settlement on the west side of tract No. 113, peaceably and in broad daylight. There were no actual improvements on tract 113; nothing at all where he settled but the boundary plow-furrow. * * * He resided upon the land, actually improved it, and worked upon it to the date of his application, and continued thereafter until ejected therefrom." (His opening brief, p. 9.)

Firstly, his settlement was *not* "on the west side of tract No. 113." The undisputed evidence was that on November 8, 1906, Cox "moved a tent house on the *northeast* corner of the tract in controversy and established his residence therein." (Pac. Rep., pp. 105, 164.) The difference might well be thought immaterial, but it is not entirely so; for the place of his intrusion was among the marks of plaintiff's occupancy, and close to her permanent improvements (Rec., p. 70). There were very clear marks of occupation (Rec., pp. 70, 164; Hart *vs.* Cox, 171 Cal., 364, 366). "It is not disputed but that Cox saw all these improvements when he erected his tent" (Record, p. 76).

As to his entering upon the land *peaceably,* that is a matter immaterial and is sufficiently considered above. He entered in the absence of the plaintiff.

As to the statement that "there were no actual improvements on tract 113," it is contradicted by the references just now given; and by the further evidence that the plaintiff had previously levelled (at least partially) and had irrigated and planted to barley about five acres of the land in dispute (Record, pp. 177-78, 104), things that are substantially admitted in the answer of Cox (Record, pp. 45-6), except that he says there were *three* acres instead of five. The fact that such small parcel did not produce a crop that year was no license for the appropriation of it by Cox. The plaintiff had irrigated and produced a good crop on 80 acres of her 320-acre claim—which was a great achievement for the first year; it was more than she was required to cultivate in order to entitle her *to a patent for the whole 320.* (26 Stats., pp. 1096-7.)

As to the statement in said brief, page 9, that Cox "actually improved" the land, the evidence without conflict was that he "did not at any time conduct any water upon any part" of it, nor "irrigate or cultivate any part thereof;" or "plant, raise or produce any crop" thereon (Record, p. 102). See 205 Pac. Rep., 89-90.

The above must suffice to indicate the caution with which many assertions of the appellant's opening brief should be received.

V.

The Contentions of Appellant Respecting His Application to Purchase the Land July 17, 1907, and the Decision of the Secretary That It "Was Substantially Good and Valid."

Such application of the appellant was rejected by the Register and Receiver of the local land office and the rejection was affirmed on his appeal to the General Land Office (Record, pp. 54, 162); he did not appeal further. Near three years after such affirmance, and in a later contest between these parties relating to their applications made in 1909, after the approval of the resurvey authorized by the Act of July 1, 1902, the Department, *per* the Assistant Secretary, rendered the decision of which the appellee complains in this case, one of the main grounds whereof is that Cox's said application of July 17, 1907, "was substantially good and valid" (Record, pp. 184-5).

If the matters advanced in the preceding pages of this brief have merit, as we claim, of course such decision was erroneous; but there are several other points touching this

feature of appellant's argument to which it seems proper to invite the attention of the court.

(*a*) The affidavit that Cox was required to make, and which he did make in support of his said application to enter the land July 17, 1907, was false and fraudulent. This was shown in the district court at the beginning of the trial. He therein stated:

> "That said land has hitherto been *unappropriated, unoccupied and unsettled* because it has been impossible to cultivate it successfully on account of its dry and arid condition" (Record, pp. 84-85).

The rules and regulations of the Department in force required that form of affidavit. It was a lawful requirement as we have above endeavored to show in this argument. The land had been appropriated, it had been occupied, and it had been settled by Miss Hart, as is established by the findings we have endeavored to marshal, and by the decisions of the courts below ascertaining the facts, and by the decision of the General Land Office adopted into the opinion of the judge of the district court (Record, pp. 67-79), and by the decision of the Supreme Court of California, referred to and adopted—as to the facts it sets out—at the trial of this cause (Record, p. 116).

Such application and affidavit of Cox were also fraudulent in that it stated that it had been "impossible to cultivate [the land] successfully on account of its dry and arid condition." Her work of reclamation as held in the California Supreme Court (Hart *vs.* Cox, 171 Cal., 364) was to be considered as directed to the whole tract. The process of bringing water upon the part he invaded had begun before his intrusion.

Such part was in process of being redeemed from its arid and desert state; and the affidavit he made was morally and legally false. Such was the opinion of the General Land Office and of the district court on this question of fact. They said:

> "Certainly she could not be required to improve each and every part of these 160 acres before she would be immune from trespassers and claimants" (Record, p. 76).

It has been decided by the Department that reclaimed desert land cannot be the subject of entry under the desert land laws (Taylor *vs.* Rodgers, 14 L. D., 194. Cited in Wheeler *vs.* Rodgers, 28 L. D., 250).

It must be equally true that if desert land is possessed and in process of reclamation by another, acting in good faith, then a trespasser thereon cannot truthfully make the affidavit required by law to be made and which Cox did make (Record, pp. 84-85).

(*b*) At the time Cox made his application and affidavit July 17, 1907, he was as has been demonstrated a wrongful intruder upon the possession of the appellee. The land therefore was not subject to the filing he attempted to make. If the views we have endeavored to exhibit regarding the rule definitively announced in Atherton *vs.* Fowler (96 U. S., 513), are correct (and we hope the court will not judge of its merits by the imperfect manner in which we have presented the subject), then Cox had no right to present such application; no more in the case of desert land salable under the desert land acts than if he were trying to initiate a homestead claim on land possessed by a prior occupant; claims to make

entries under the desert land law are "subject to contest, as provided by the law relating to homestead cases, for illegual inception" (Act of March 3, 1891, 26 Stats., 1097).

It will be useless to reply (if appellant should reply) that when Cox made the said affidavit on July 17, 1907, he was already in possession of the land; for his possession was that of a trespasser. To allow the intruder any such privilege would, of course, destroy the efficacy of the law against intrusion. Its purpose is the prevention of oppression and disorder. Besides, that question is concluded by the decision of this court in Trenouth *vs.* San Francisco (100 U. S., 251, 255), where an act of Congress designed for the relief of persons who had in good faith taken possession of certain public lands under claim of right in the city of San Francisco, was held to be unavailing in favor of persons "who at the time of the passage of the act were in possession by intrusion and trespass and who were shortly after the filing of the plat removed by writ of ejectment," as Cox was removed in the present case.

(c) The application of Cox filed July 17, 1907, contained no lawful description of the land. In the consideration of this question it is proper to look both to the statutes and to the regulations of the Land Office in force when Cox made his filing. The Act of March 3, 1877 (19 Stats., p. 377), provided that the applicant for desert land may "file a declaration under oath * * * that he intends to reclaim a tract of desert land not exceeding one section by conducting water upon the same, etc., * * * such declaration shall describe particularly such section of land if surveyed, and, if unsurveyed, shall describe the same as nearly as possible without a survey."

The order of the Commissioner of the General Land Office, May 24, 1907, applicable to lands in the Imperial Valley required all entries to

> "describe the land with reference to the established lines of the original survey, to be adjusted by legal subdivisions to the lines of the resurvey when established; and after resurvey, the entryman will be required to make oath in the form of an affidavit corroborated, showing the legal subdivisions of his claim" (Record, p. 141).

That regulation was vindicated in a subsequent letter on January 18, 1910, from the Commissioner to Satterwhite, special agent, and was said to be "a necessary rule of administration, intended to prevent confusion in descriptions of land applied for, resulting from private surveys of Imperial Valley lands and to reduce the conflicts between claims to a minimum" (Record, pp. 147, 151).

In the description in the application filed by Cox July 17, 1907, there was no compliance either with the requirements of the statute of 1877, or of said regulation of the Land Office. In the opening brief for appellant here (pp. 5-6) there is an assertion that "it was clearly within the pending Commissioner's order of May 24, 1907, as it described the land with reference to the 1854-7 surveys." This assertion is a repudiation of the decision of the Secretary under which Cox claims, who distinctly held that a description,

> "In an application, of land by the old survey was an impossible condition, and a description by metes-and-bounds the only feasible one. Cox's application, made by metes-and-bounds, was in fact a proper application, etc." (Record, p. 184).

The decision of the Secretary went upon the ground that the application of Cox contained a sufficient "metes-and-bounds" description, and none other.

Further, in the answer of Cox, he expressly alleged that he "does not know by what description the lands now known as Tract 113, were known or described by the survey of 1856," and alleges that, "as nearly as he can estimate," they constituted the northwest corner of section 14 in T. 14 S., R. 14 E., etc. (Record, p. 55)—land which is nowhere mentioned or referred to in the description he gave in his said application. Both the decision of the Secretary and the allegations of Cox's answer are irreconcilable with the statements in the opening brief of his learned counsel (pp. 5-6).

Looking at the description in Cox's said application (Record, p. 54) it plainly does not purport to describe, and is not an attempt to describe, the land "with the reference to the established lines of the original survey." It states merely a point of beginning said to be *"5 miles and 2,506 feet* west from a point which, from its relation and bearing to Sunset Spring as described in the field notes of the original survey of the said land made in 1856, is *believed* to be the common corner of sections," giving their numbers. Not a single "established line" of the original survey is referred to nor does it appear who entertained the "belief" mentioned. The point 5 miles and 2,506 feet from the point of beginning is wholly unidentified. Aside from its other infirmities, such a description is of no avail as a metes-and-bounds description. Farrell *vs.* Edward Rutledge Timber Co., 258 Fed., 161, 164; 169 C. C. A., 229, 232.

Still, the description must stand on its effect as a metes-

and-bounds description. If it was not good as such it was not good at all. As stated, that was the opinion of the Secretary (Record, pp. 184-5). *But if, as held by the Secretary* (Record, p. 183), *these were "surveyed" lands, there was no law authorizing the receipt by the local officers of any such description.* Section 1 of the Act of March 3, 1877 (19 Stats., 377), is explicit: "Such declaration shall describe particularly said section of land [of course it must be the same if the application is for part of a section] if surveyed, and, if unsurveyed, shall describe the same as nearly as possible *without* a survey." Obviously if the land is "surveyed" the description must correspond with the lines of the *survey*. Only in case *it is unsurveyed* is a description by metes and bounds permissible.

Hence, if the description in Cox's application was, as the Secretary said, good and valid it was so only because the lands were in fact *un*surveyed, and the *theory of the Secretary's decision and the theory of the appellant's case falls* like the traditional "house of cards;" for if the lands were unsurveyed then, of course—as we maintain was clearly the truth—the Act of March 28, 1908, necessarily applied in the case, and since, as has been shown, the appellee was long prior in possession and long prior in commencing the process of reclamation, she has the "preference right" under the proviso in that statute, and not Cox.

Whoever wrote the opinion delivered in the name of the Honorable Assistant Secretary of the Interior (Record, pp. 181-185), did not, we think give proper, or any, weight to these considerations.

Next, treating the lands as unsurveyed, as they were in truth, the so-called description by metes and bounds (Record, pp. 53-54) was *in the teeth* of and contrary to the regulation of the Department at that time requiring a description "with reference to the established lines of the original survey, to be adjusted by legal subdivisions to the lines of the resurvey when established." We have in previous pages of this argument stated what we deem to be the object and effect of that requirement, understood in connection with the subsequent commentary of Commissioner Dennett (Record, p. 151). Here we need only point out that the metes-and-bounds description in Cox's application, relied on by the Honorable Assistant Secretary, is not an attempt to comply with the regulation (Record, p. 184). *It was for that reason* that the register and receiver rejected Cox's application. Register Prescott testified "during the year 1907 I would not accept any application presented by metes and bounds. All such applications were rejected at once" (Record, p. 195). That such was the practice of the land office, and that that was the reason for the rejection of the application of Cox, namely, that it was a metes-and-bounds description, and that the lands "were not described according to the lines of the original survey," appears in the record at pages 18, 153 (relating to W. A. Keeners' application), 183-184.

The Secretary did not hold, no officer of the land office held, that such application should have been allowed, until the year 1913. The decision of the Secretary was contrary to and violative of the said regulation (Record, p. 141), and is confessed by him to be in disregard thereof (Record, pp. 183, 184). He had no lawful power to so hold, and thus cut out the *intervening application made by Miss Hart July* 30,

1907, *which did comply with the said regulation "as near as possible"* (Record, p. 17); such application of appellee is shown by the record to have been "as to form and substance in all respects in compliance with the desert-land act and the rules and regulations of the Land Department" (Record, p. 86).

We shall return to this subject at a later page, where we treat the case of Kendall *vs.* Bunnell, 205 Pac. Rep., 78, 88, which holds the opposite of the decision of the Assistant Secretary (Record, pp. 184-185) on this proposition.

Neither the Secretary of the Interior nor the Commissioner of the Land Office has power to make a retroactive decision violating the effect of the established rules, regulations, and settled practice of the Department in reliance upon which entrymen have acted.

Germania Iron Co. *vs.* James, 32 C. C. A., 348; 89 Fed., 811, 813-817.

James *vs.* Germania Iron Co., 46 C. C. A., 476; 107 Fed., 597, 600-605, 607-10.

Howe *vs.* Parker, 111 C. C. A., 466; 190 Fed., 738.

Cosmos Exploration Co. *vs.* Gray Eagle Oil Co., 50 C. C. A., 79; 112 Fed., 4.

El Paso Brick Co. *vs.* McKnight, 233 U. S., 250, 257, 288.

Until a rule of the Department is changed, it has the force of law, and acts done under it while it is in force must be regarded as legal.

Cudney *vs.* Flannery, 1 L. D., 165, 166.
Stevens *vs.* Robinson, 5 L. D., 111.
Henry W. Fuss, 5 L. D., 167, 169.
Oliver *vs.* Thomas, 5 L. D., 289, 292.
Watt *vs.* Forsythe, 5 L. D., 624.
Tustin *vs.* Adams, 22 L. D., 266.

The same principle has been declared to be "the law of this court."

Gelpke *vs.* Dubuque, 1 Wall., 206.

The only proper power of the Secretary when he concluded that Cox's application of July 17, 1907, had been improperly rejected because the said regulation of May 24, 1907, could not be enforced, was to allow Cox to file a new application, *if no intervening rights had attached.*

Frank Larsen, 23 L. D., 452.
Needham *vs.* N. P. Ry. Co., 26 L. D., 444.
De Courcy *vs.* Vandevert, 38 L. D., 457.

Further, the description purporting to be a metes and bounds description was intrinsically insufficient; it described nothing. It read in part:

> "Commencing at a point 6,280 feet south and 1,134 feet east of a stake in township line between townships 13 and 14 S., R. 15 E., as marked on the ground * * * in the *official resurvey* of the exterior line of said township, which stake is marked," etc. (Record, pp. 53-54).

There was no resurvey and no such township line, and there were no townships 13 and 14 of the resurvey at that time. That was July 17, 1907. The attempt was to "tie" to the lines of a survey not in existence, for the township plat was not approved by the surveyor general until November 4, 1908, and was not filed until February 23, 1909 (Record, pp. 21, 136, 181). Until then, there was no resurvey and no township lines thereof. Until then, nobody knew where the lines of said townships were to be situated.

Sawyer *vs.* Gray, 205 Fed. Rep., 160, 163, and cases cited.

Bullock *vs.* Rouse, 81 Cal., 590, 594-5.

Buxton *vs.* Traver, 130 U. S., 232.

This court held in Coan *vs.* Flagg, 123 U. S., 117, 129-30, that lands over which lines of a survey had been extended, but which survey had not been approved and filed, remained "unsurveyed lands," and its decision was followed in Board of Trustees *vs.* Cuppett, 52 Oh. St., 567; 43 N. E. Rep., 792. In Farrell *vs.* Edward Rutledge Timber Co., 169 C. C. A., 229, 232, the question was under an act of Congress requiring the selection of unsurveyed lands by a railroad company to "designate the same with a reasonable degree of certainty." The court there held, in a controversy between the railroad company and a homestead claimant, that:

> "To designate the section of land in which the section in controversy is situated in terms of a future survey was wholly insufficient to designate the same with a reasonable degree of certainty" (169 C. C. A., 232).

VI.

APPELLANT'S CONTENTION THAT THE APPELLEE WAS WRONGFULLY IN POSSESSION OF THE LAND WHEN HE INTRUDED UPON SUCH POSSESSION.

It is asserted that she "had no authority to take possession of 320 acres of public desert lands prior to filing of an application" (Appellant's opening brief, p. 42) and similar assertions are made elsewhere. If the appellee had no right, as against Cox, to be in possession of the said 320 acres of land she could not have maintained her action against him in the courts of the State to recover her possession.

One fault of appellant's contention is that it does not discriminate between the rights of the United States *and the rights of Cox.* As long as the United States took no action to question her possession, Cox was without any right or authority to assume the power of the paramount owner, and oust her of possession in which the Government acquiesced. Lyle *vs.* Patterson, 228 U. S., 211, 215-16.

The case of Atherton *vs.* Fowler, and the line of cases of which it was the precursor, have never made any distinction, in enforcing the rule forbidding the initiation of rights on public lands already actually possessed by a prior occupant, between cases where he had consummated the right to possession as against the Government, and those cases where he was liable to be dispossessed by action of the Government.

In the present case Miss Hart *was in possession in good faith claiming the right to make entry under the desert land law* (Record, pp. 72, 76, and elsewhere), and she was proceeding diligently with the process of reclamation. She was

a *bona fide* claimant and exerting herself to comply with the law and its policy.

Congress has legislated upon a siimlar subject. The Act of February 25, 1885 (23 Stats., 321), prohibits the enclosure of public lands by any person who has "no claim or color of title made or acquired in good faith, or an asserted right thereto by or under claim made in good faith with a view to entry thereof at the proper land office under the general laws of the United States." The same statute declares unlawful the assertion of a right to use, and occupancy of, any part of the public lands "without claim, color of title, or asserted right as above specified as to enclosure."

Necessarily this statute implies permission to enter for uses excepted from its general purpose. It has always been held to be without application to cases of persons occupying public lands with a design in good faith to acquire title to the same by lawful procedure. A settler in advance of surveys who encloses no greater area than the land laws permit him to enter is not a trespasser, nor is his enclosure unlawful. United States *vs.* Godwin, 7 Mont., 402; Warring *vs.* Loomis, 35 Wash., 85; United States *vs.* Feldeward, 36 Fed. Rep., 490, 491; Cameron *vs.* United States, 148 U. S., 301.

The similar act of March 3, 1807, was held to afford a remedy to the United States *alone*, and further that it in no way affected the rule declared in Atherton *vs.* Fowler, 96 U. S., 513; McBrown *vs.* Morris, 59 Cal., 64, 76; which case was cited by this court with approval in Clipper Mining Co. *vs.* Eli Mining, etc., Co., in support of the general proposition that no right can be initiated on Government land in the actual possession of another by fraudulent or clandestine entry thereon. (194 U. S., 231.)

Many other cases might be cited but it seems unnecessary. Miss Hart was rightfully in possession of this land by the license of the United States; and whether she had such license or not, is not a question which Cox is competent to raise.

VII.

Vague Intimations of Appellant About a Phantom "Rule of Property" Dependent in Part, it is Claimed, on Imaginary "Confidential Records."

Opening Brief, pp. 34-36.

These intimations (which approach the apex of incertitude, directed, we suppose, against the construction placed by the courts below on the Act of March 28, 1908, are without support in the record. The patent issued to Cox itself describes the land in terms of the new survey authorized by the Act of July 1, 1902 (Record, pp. 65, 136, 181). *Before* that act *"in many if not all"* desert-land entries in the Imperial Valley the lands were described, not by the old survey of 1856, but "in accordance *with a private survey*"; "it was found impracticable to issue patents thereon *until after the resurvey* shall have been made and the final entries adjusted to it" (Record, p. 138). All filings subsequent to March 31, 1906, were subject, as regards the description of the lands applied for, "to adjustment by legal subdivisions to lines of resurvey authorized by Act of July 1, 1902" (Record, pp. 141-2).

There is no evidence, that we can discover, that a single patent was issued according to the supposed lines of the "old survey"; and if there were such issue, it is not perceived how

the title of the holder could be affected by holding, with the courts below, that the Act of March 28, 1908, and its proviso, took effect in the Imperial Valley.

VIII.

KENDALL VS. BUNNELL, CAL. DIST. CT. OF APPEAL, 205 PAC. REP. 78. APPELLANT'S APPARENT RELIANCE ON THIS CASE IS MISPLACED. TO THE CONTRARY, ITS TEACHING IS FATAL TO THE DECISION OF THE DEPARTMENT IN APPELLANT'S FAVOR.

That was a case in the State courts for a purpose similar to the purpose of the suit here—to control a patent issued for lands in the Imperial Valley; Kendall, the plaintiff there, claiming that the law had been mistaken by the land officers. The opinion of the District Court of Appeal (205 Pac. Rep., 78), reversing the judgment of the trial court in favor of Kendall, is very lengthy and contains some inconsequential dicta on which the appellant here seems to place reliance. For instance, the court there said, on the question whether the lands were to be regarded as surveyed or unsurveyed within the meaning of the Act of March 28, 1908 (35 Stats., 52), that the "argument" advanced by the appellant to sustain "the contention that the lands should be regarded as surveyed possesses much cogency and persuasive force" (205 Pac. Rep., 81), a remark that would hardly have been made if the law and the facts had been fully before the court. It was the merest dictum, for the court said immediately, "the case can be decided without undertaking to pass upon this interesting question," and it

therefore assumed throughout for the purposes only of its decision that "these lands had the status of unsurveyed lands," after the passage of the Act of July 1, 1902, authorizing the resurvey (205 Pac. Rep., 81).

If there is anything in Kendall *vs.* Bunnell which holds or intimates (however obscurely) that the resurvey authorized by Act of Congress of July 1, 1902 (32 Stats., 728) did not supersede, and was not intended to supersede, the obliterated survey of 1856, or that the lands in the Imperial Valley were surveyed lands in any sense to prevent the operation of the Act of March 8, 1908 (35 Stats., 52), then such holding or intimation is contrary to the decisions of the Supreme Court of California, which distinctly holds that 16th and 36th sections, title to which passed to the State when the old survey was made, under the Act of March 3, 1853 (10 U. S. Stats., p. 246), have location *only where the resurvey placed them;* which is saying, in effect, that after the passage of the Act of July 1, 1902, the lands were unsurveyed for legal and practical purposes as much as though they had never been surveyed at all.

Re Scott, 173 Cal., 363.
Re Scott, 182 Cal., 83, 85.
Miller *vs.* Marchus, 171 Cal., 259.
Nichols *vs.* McCullom, 169 Cal., 614, 616.

Of course dicta (if there are any) in the said opinion of the District Court of Appeal contrary to the decisions of the Supreme Court of the State, do not illustrate the law there understood.

Taking up the matters actually decided in Kendall *vs.* Bunnell, it is notable that the District Court of Appeal there

held the law to be *directly to the contrary* of the opinion of the Hon. Assistant Secretary of the Interior respecting the sufficiency of the application of Cox filed in the local land office July 17, 1907 (Record, pp. 82, 182, 184-5). The Assistant Secretary ruled that the metes and bounds description of the land in the application filed by Cox July 17, 1907, was "substantially good and valid." Such metes and bounds description was this:

> "Commencing at a point 6,280 feet south and 1,134 feet east of a stake in township line between townships 13 and 14 S., R. 15 E., as marked on the ground by U. S. Surveyor A. A. Henderson in the *official resurvey* of the exterior of line of said township, which stake is marked to indicate common corner to sections
>
> $$\frac{31:32}{6:5}$$
>
> and running thence south 40 chains," etc.

As we have elsewhere pointed out, when said application of Cox was filed, July 17, 1907, the resurvey authorized by Act of July 1, 1902, was incomplete, had not been approved, nor filed anywhere; it was not approved by the Surveyor General until November 4, 1908, and not filed in the District Land Office until February 23, 1909 (Record, pp. 21, 136, 181). Such approval and filing was essential to its existence.

Buxton *vs.* Traver, 130 U. S., 232, 235.

Coan *vs.* Flagg, 123 U. S., 117, 129-30.

Now in Kendall *vs.* Bunnell, the plaintiff there had filed a desert-land application No. 01487, describing the land he sought to enter by certain subdivisional numbers. He

afterwards claimed that such numbers and descriptions should be understood as referring to the *re*survey of the Imperial Valley. Speaking of this subject the court said:

> "At the time when the plaintiff filed this application No. 01487, the plat of the resurvey had not been approved. At that time, therefore, there was no resurvey." * * * "'There is, in fact, no such tract of land * * * until it has been located within the Congressional township, by an actual survey and establishment of the lines under the authority of the United States and the survey has been approved by the proper United States Surveyor General.' * * * Middleton *vs.* Low, 30 Cal., 605." (205 Pac. Rep., 83.)

The local land officers rejected such application of Kendall. The sufficiency of such application was a main question before the District Court of Appeal. It discussed the subject at length; it pointed out that Kendall appealed from the decision rejecting his application No. 01487 to the Commissioner; that he then for the first time claimed that his description was intended to refer to lines of the resurvey; that the Land Office treated it as referring to the old survey; so treated, the description did not apply to the land Kendall wanted to enter, etc. The court said further:

> "As already stated, the plat of the resurvey was approved by the United States Surveyor General November 4, 1908, and was filed in the local land Office February 23, 1909." (205 Pac. Rep., 84.) "As we have already pointed out, on March 8, 1908, when the plaintiff filed his first application * * * no resurvey of these Imperial Valley lands had been made. It was not until some time later that the plat

> of the resurvey was approved by the United States Surveyor General, and, as we have shown, a Government survey dates from the approval of the plat. Until then, there is no official survey. * * * *The description in the plaintiff's first application can be made to fit the land in controversy only by treating it as referring to the lines of the subsequently approved resurvey, the plat whereof was not filed until February 23, 1909. But that, for the reasons stated, we may not do.*" (205 Pac. Rep., 87.)

Other reasons were discussed by that court for its conclusion that "no inceptive right was initiated by Kendall's said first application;" but as we understand the opinion the Court distinctly holds that the lines of the resurvey, before it was approved and duly filed, *were no lawful means of describing the land applied for.* The holding is sound in legal reason; authorities elsewhere cited in this brief support it.

Secondly, in Kendall *vs.* Bunnell, the court upheld, and decided to be indispensable, the very requirement of the land office in force July 17, 1907, for want of conformity with which the department rejected Cox's application—the same regulation which the Secretary in 1913 in awarding tract 113 to Cox, retrospectively held to have been properly disregarded by Cox (Record, pp. 183-5); viz., the requirement in the order of the Commissioner of May 24, 1907, that applications for entries "must describe the land with reference to the established lines of the original survey, to be adjusted by legal subdivisions to the lines of the resurvey when established," etc. (Record, p. 141).

It was for failure of the application of Cox to comply with that regulation that the local land officers, and the

Commissioner on appeal, rejected it (Record, pp. 18, 153, 183-4); but the Secretary held years later that Cox was not bound to observe the regulation.

The law declared in Kendall *vs.* Bunnell, is directly opposed to such decision of the Secretary:

> "If it were permissible to read plaintiff's original application in the light of his then undisclosed intention to describe the land according to the resurvey that then was in progress, and if so reading the application, it were permissible to hold that it was intended to and does describe the lands by reference to the lines of the subsequently approved resurvey, nevertheless such application would not create any inceptive right in plaintiff. For, so construed, the application would violate the then existing department regulation that all applications to make desert land entries of any of the lands that were to be resurveyed 'must describe the land with reference to the established lines of the original survey.' The Land Department may make any regulation, not inconsistent with the law, which is suitable to the execution of the land system with which Congress has intrusted it. Caha *vs.* United States, 152 U. S., 211, 14 Sup. Ct., 513; 38 L. Ed., 415; United States *vs.* Smull, 236 U. S., 405; 35 Sup. Ct., 349; 59 L. Ed., 641; United States *vs.* Hearing (C. C.), 26 Fed., 744.
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> "That the regulation requiring the lands to be described with reference to the established lines of the original survey, pending the completion of the new survey, is in harmony with the statutes, and is such as is reasonably necessary and proper to be observed in the administration of the system that Congress has established for the disposition of public lands, cannot admit of doubt. At that time there

were few, if any, natural monuments on these desert wastes whereby the land that an applicant might desire to reclaim could be identified for the purpose of making an entry in the land office. Therefore the only practicable means for identifying the land was to make reference to some survey. There was no resurvey then in existence, nor could there have been until the plat of the resurvey should be approved by the duly empowered government official. It was not practicable for the Government to rely upon a private survey. Unless, therefore, the department should entirely suspend all right to make application to enter these lands under the Desert Land act until the resurvey should be made and approved by the proper United States Surveyor, the only practicable means for identifying any land for the purposes of a desert land entry was to pursue the course that was prescribed by this department regulation, that is, to describe the land that the applicant desired to reclaim by a reference, as nearly accurate as the circumstances might permit, to the lines of the only official survey that ever had any existence prior to the resurvey, viz., the 1856 survey, and then, when the resurvey should be made, adjust the entry to the lines of the new survey. For these reasons the regulation was a reasonable and suitable regulation, and as such, it had all the force of a law. United States *vs.* Thurston, 143 Fed., 287, 291; 74 C. C. A., 425; Peters *vs.* United States, 2 Okl., 116; 33 Pac., 1031. This being so, any claim by plaintiff that his original application describes the lands according to the lines of the resurvey that then was in progress is self-destructive. It is a claim that at once negatives the creation of any inceptive right to the land by disclosing a willfull and fatal disregard of a binding and

valid regulation of the Land Department that had all the force of law.

"'If the applicant was guilty of any violation of the law, such violation vitiated the proceeding in toto. * * * Here, there was a distinct violation of law on the part of the entryman, and one which vitiated the application as a whole.' Hyde *vs.* Bishop Iron Co., 177 U. S., 281, 288, 289; 20 Sup. Ct., 592, 594 (44 L. Ed., 771)."

205 Pac. Rep., 88.

Thus the action of the General Land Office in rejecting the said application of Cox, filed July 17, 1907 (Record, pp. 18, 54), is shown to have been correct and the subsequent decision of the Secretary supporting the application (Record, pp. 183-4-5), is shown to have been mistaken.

In Kendall *vs.* Bunnell the court discussed Kendall's claim to the benefit of the proviso in Section 1 of the Act of March 8, 1908—his claim of a "preference right." It reviewed the evidence and held that it was insufficient to show that Kendall had "in good faith, commenced the work of reclaiming" the land he sought to enter within the meaning of that statute; the discussion is instructive; on that question of fact, the court held that Kendall had not done the things necessary to entitle him to the "preference right." (205 Pac. Rep., 89-90.) In the present case of Cox *vs.* Hart the same question of fact has been determined by the General Land Office, and by both courts below in Miss Hart's favor, and that conclusion, as we have shown elsewhere, will be, as we understand the law, accepted as final in this court; the opinion of the State Supreme Court (171 Cal., 364, 367-8) and the clear implications derivable from the opinion in Kendall *vs.* Bunnell, 205 Pac. Rep., 89-90, also support it.

IX.

The Contention of Appellant That a Right to Make a Desert Land Entry Could be Initiated Even as Against Him Only by the Filing of an Application—Not by Taking Possession and Proceeding to Reclaim the Land.

The argument of appellant in this behalf necessarily assumes as a postulate that the Act of March 28, 1908 (35 Stats., 52), was without effect in the Imperial Valley. The argument falls of course, with the untenable hypothesis on which it rests.

But in any aspect, the argument is unsound—and out of place in the present case. There are several other answers to it.

1. We believe we have demonstrated, irrespective of the effect of said statute of March 28, 1908, that the application of Cox filed July 17, 1907, was invalid and was rightly rejected by the Land Office. Hence the application of the appellee filed two weeks later, July 30, 1907, was first in time. It was a valid application. Among other circumstances of it, the following appears in the record:

> "said application [of July 30, 1907], and other documents [filed with it] were as to form and substance in all respects in compliance with the Desert Land act and the rules and regulations of the Land Department" (Record, p. 86).

She described the land, "as near as it was possible to describe said land according to said survey of 1856" and "sub-

ject to adjustment according to the resurvey when made," and thus complied with the order of the department of May 24, 1907, which Cox, in his application had disregarded (Record, pp. 15, 17, 86, 141). "In all respects," the record shows, her application was lawful in form and substance (Record, p. 86). It was rejected by the Land Office for the supposed reason that the numbers given by her description of the land she wanted to enter had been used by other claimants in attempting to describe lands *they* wanted to enter. But there was in fact no conflict; the appellee was not trying to enter land in reality claimed by other people, and it was stipulated at the trial of this cause that the persons who had nominally made claim to the lands sought to be described by the appellee's said application of July 30, 1907, were *really* claiming other and different land, two miles away, and that there was no such claim *on the ground* to the land in dispute, subsequently described by the resurvey as Tract 113, or to Tracts 114 and 115 (Record, pp. 16, 17, 196). The confusion arose because of the impossibility of fixing the lines of the 1856 survey. Plaintiff was doing the best she could to comply with the regulation promulgated May 24, 1907 (Record, p. 141).

If, therefore, an application in the Land Office was, under the conditions existing in the Imperial Valley, indispensable to initiate a right to desert land (a proposition we deny and combat), the plaintiff was yet clearly the first to present a lawful application to enter the land in dispute.

2. *It was no fault of the plaintiff that she failed to have an application on file in the local land office* long prior to the alleged application of Cox. Between February, 1906, and May, 1907, she made several visits to the local land office for the purpose of entering the land and was informed

that there was no method by which she could file an application; the officers representing, among other things, (and doubtless quite honestly according to the lights they had, but yet contrary to the fact, Record, p. 196) "that applications to enter said land had already been filed" (Record, pp. 124-5). It further appears that in June, 1907, she again went to the land office accompanied by two other persons, and explained to the Register that the land she desired to enter was not claimed by anybody; and thereupon she was informed as she had been informed previously, and more than once, that the only way "plaintiff could get any right to the land *would be by settling upon and holding possession* and waiting until the resurvey had been made." Those officers had previously advised that "when the plats of the resurvey were filed she * * * would have a preference right" (Record, p. 125).

This evidence was without substantial conflict. The testimony of Mr. Prescott, former Register (Record, pp. 194-5), contains no material contradiction. Two things are apparent; firstly, that the unprecedented conditions relative to surveys, and the consequent difficulties in defining claims to desert land in terms that would satisfy the law and the regulations of the Department caused a tentative, dubious practice in the local land office; everything was subject to adjustment after the resurvey should be made (Record, pp. 141-2); secondly, the appellee made all reasonable efforts to place on file a valid initiatory application to enter, and she conformed her conduct to the recommendations of the local land office.

On both accounts her equities were superior to those of Cox, a trespasser upon her possession, having notice of her possession and her claim.

The situation was, for legal purposes, not dissimilar to that where a person occupied unsurveyed land intending to make a homestead or pre-emption entry but was deterred because of *no local office* where he could make a filing. This court said:

> "The right of one who has actually occupied, with intent to make a homestead or pre-emption entry, cannot be defeated by the mere lack of a place in which to make a record of his intent." Tarpey *vs.* Madsen, 178 U. S., 215, 219.

Quoted with approval in Nelson *vs.* N. P. R. R. Co., 188 U. S., 124.

Cases are somewhat numerous in which persons striving, in good faith, to acquire or protect claims to the public lands have failed of perfect accomplishment of such design by reason of conditions which they could not control, or because of reliance on recommendations of local land officers, and have yet been permitted to effectuate their rightful purpose, especially against *an adversary having no superior equity*, and to control, as against him, a patent of the United States that has been issued to him. The principle we contend for in this behalf has been often illustrated:

Ard *vs.* Brandon, 156 U. S., 537, 543.

Duluth, etc., R. R. Co. *vs.* Roy, 173 U. S., 587, 590, 591.

Nelson *vs.* Northern Pac. Ry. Co., 188 U. S., 108, 123.

Oregon, etc., R. R. *vs.* U. S., 189 U. S., 114-15.

Lytle *vs.* Arkansas, 9 How., 314.

Germania I. Co. *vs.* James, 89 Fed., 811, 814-15.

Schmidt *vs.* Stillwill, 1 L. D., 177.

In such cases, the opinion expressed by the land officers to the intending entrymen may become, and has been repeatedly treated as important. It was so in Duluth, etc., R. R. Co. *vs.* Roy, 173 U. S., 587, 588, and in Hall *vs.* Armann, 41 L. D., 430, 431, 432, and in the case of Virgil Patterson, 40 L. D., 264, 266, and in other cases above referred to.

"Where a party acts upon the suggestion of the officers of the Government he should lose nothing unless required by the absolute demands of the law, especially when the adverse claim is * * * inequitable" (Schmidt *vs.* Stillwill, 1 L. D., 177-178).

(3.) We respectfully claim further that it is a conclusive answer to the oft-repeated assertion of appellant's learned counsel, that no right to enter desert land is initiated except by the filing of an application in the local land office, and that occupancy of the land counts for nothing—to point out that although such may be the rule as between the occupant and the United States, *it is not the rule as between the occupant and an intruder such as the appellant here,* where the occupant is in actual possession and in good faith engaged in the business of reclaiming the land, as was the appellee in this case; in such a case we submit that it is clear that the occupant does by the fact of occupancy initiate a claim valid as against all except the United States.

And a test of this question (which we submit to be a conclusive test), is whether, *if the process of reclamation in which a prior occupant is engaged were carried through to completion,* so that the land were at length *reclaimed* in compliance with the law—some other person could enter it over his head and take it away from him.

Clearly this could not be done; when land has ceased to be desert land no one else could enter it as such. And so it is held. Thus in the case of Taylor *vs.* Rodgers (14 L. D., 194), reclamation of a parcel of desert land was effected by a Fair Association, a corporation, which, as there held, *had no capacity* to enter the land at all; and of course it had no right as against the United States to occupy the land at all. Yet the reclamation by such Fair Association was held enough to defeat the attempt of Rodgers to make entry of the same under the Desert Land acts.

To similar effect was Chaffin *vs.* Swift, 31 L. D., 89.

In Fisher *vs.* Ballinger, 36 App. Cas. D. C., 511, Taylor *vs.* Rodgers, *supra,* was approved. There, a 320-acre tract of desert land had been so far reclaimed that in one year it produced 200 tons of hay. The report shows that production of the crop was at the rate of something more than a ton per acre for the part of the land on which it was produced, so there must have been a large part of the land that was uncultivated. The entrywoman relinquished it, and another filed an application to enter the tract as desert land—making affidavit, the same form of affidavit made by Cox in this case (Record, pp. 84-85), that "said land has hitherto been unappropriated, unoccupied and unsettled, because it has been impossible to cultivate it successfully because of its dry and arid condition." The falsity of the affidavit was commented upon by the court; but its decision went upon what the court deemed to be the very obvious ground that "at that time the land had been effectually reclaimed, and so not subject to desert land entry." (36 App. Cas. D. C., 517).

Obviously, it is the effect of this decision (which affirmed

the similar decision of Secretary Ballinger in the same case 40 L. D., 294, 297), that a reclamation of desert land which even is not advanced to the *complete* irrigation and cultivation of the land may yet render it impossible of entry by another claimant; and it is equally obvious that this result follows from the fact that the possessor has by occupation and engagement in the process of reclamation *initiated a right good as against everybody* except the Government. For yet stronger reasons must such initiated right be good against a trespasser and intruder.

It follows that some general expressions (in a few cases) to the effect that occupation of desert land does not, or can not, initiate any right thereto, are stated too broadly; that may be so, in general, as to initiating rights against the United States, but not as to initiating rights against others. Perhaps we should notice briefly a few cases cited by appellant. For instance, Wheeler *vs.* Rodgers (28 L. D., 250), cited in appellant's brief at page 42. Appellant here comments on the circumstances that the land was enclosed with a board fence 8 feet high, and had buildings and a race track for use by a fair association, and that it was yet held to be the subject of a homestead entry. But appellant refrains from showing the further controlling facts appearing in the report of that case, viz., that the fair association had long before the entry of Rodgers ceased to do business, that such association was *without power itself to make any entry of the land*, and that its structures left on the land constituted a naked trespass, merely cumbering the ground.

In Selway *vs.* Flynn, 6 L. D., 541, cited by appellant (his brief, pp. 13, 44), the decision is without any persuasive force here. Such possession as Mrs. Selway and her

husband had of the land there in dispute, and before the filing of the application of Flynn, was acquired under a railway company which "had no right to the control of the land." It did not appear that Mrs. Selway was in possession of the land, unless the ownership of some fencing she had purchased from her husband constituted possession, or that she had made, or was making, any efforts for its reclamation at the time of Flynn's filing.

In the case of Kendall *vs.* Bunnell (205 Pac. Rep., 78, 91-92) the court found the fact to be, and so decided, that Kendall "never, prior to survey, in good faith commenced the work of reclaiming the land"; and it was in view of these circumstances that the court used the broad language on which the appellant affects to rely (his brief, pp. 15-16 and elsewhere).

The court there said:

> "He [Kendall] could not, by simply taking possession, claiming the land as his own, and doing things *that gave him no preference right*, estop the defendant from acquiring title in the manner provided by the acts of Congress," etc. (205 Pac. Rep., 92.)

An important difference between that case in this particular and the present case is that *here* Miss Hart had done the things at the time that Cox "jumped" her claim, and she was "doing things," that did give *her* a preference right, as held and decided as matters of fact by the Commissioner of the Land Office, and both the courts below (Rec., pp. 74-83, 226), and by the Supreme Court of California (171 Cal., 364, 366-8).

Maddox *vs.* Burnham, 156 U. S., 544, several times cited

by appellant (his brief, pp. 16, 38, 40, 46), is so devoid of similarity to the facts of the case here that comment on it seems almost idle. There, after the defendant moved upon the land, which he intended to claim as a homestead, but before he had taken any step to enter the same, it was *withdrawn by action of the Government* from the right to homestead it, and was granted in aid of a railroad. Of course he acquired no rights as against the Government. He claimed that he had some sort of permission from the Register of the Land Office to occupy the land: authority to give which permission the court very properly held not to reside in the Register. The appellee here advances no such preposterous contention as that the conversations she had with the officers at the local land office did or could dispense with any procedure the *law* imposed upon her; our views on the subject, and the authorities to support them appear under a previous head of this brief. Appellant says "If the Department is wrong it has been wrong for forty-five years," etc. (his brief, p. 16). The trouble is that he attributes to the Department a "wrong" it has not practiced. Thus, for instance, in Buxton *vs.* Traver, 130 U. S., 232, the Court said,

> "A settlement upon the public lands in advance of the public surveys is allowed to parties who in good faith intend, when the surveys are made and returned to the local land office, to apply for their purchase."

The statement in Buxton *vs.* Traver, is one of familiar application and not confined to cases of pre-emption or homestead. Holmes *vs.* U. S., 55 C. C. A., 489, 492-3, and cases there referred to. Nelson *vs.* N. P. Ry. Co., 188 U. S., 108, 123.

In McAllister *vs.* Okanogan County, 51 Wash., 647, the question was upon the effect of the Act of February 25, 1885 (23 Stats., 321), to prevent unlawful occupancy of the public domain, etc. The court said:

> "A settler upon the public land in advance of the survey who encloses no greater area than the land laws permit him to enter, is not a trespasser, nor is the enclosure unlawful. On the contrary from the very beginning of the Government such settlement has been encouraged" (51 Wash., 650).

The court cited to support its view Cameron *vs.* U. S., 148 U. S., 301, and Buxton *vs.* Traver, 130 U. S., 232. To similar effect, Lyle *vs.* Patterson, 228 U. S., 211, 215-16.

X.

THE FINAL PROOF MADE BY APPELLANT BEFORE THE LOCAL LAND OFFICE WAS VITIATED BY THE FALSITY OF HIS TESTIMONY THEN DELIVERED.

The plaintiff introduced in evidence at the trial of this cause the testimony given by Cox before the Register and Receiver in making his final proof November 28, 1916 (Record, pp. 95-102). His answers about the irrrigation and reclamation of the land were in the passive voice. He stated very little as to what he had done on the land but did give the following testimony:

> "This land has been irrigated and reclaimed to such an extent that it will produce agricultural crops.
> "I have seen water distributed over all the irrigable area in each legal subdivision of this land * * * 150 acres has been actually tilled. * * * This

> area has been in cultivation since the year 1910. * * * The crops have been fairly good. * * * Agricultural crops have been produced on this land for at least seven years" (Record, pp. 97-99).

The only statement as to what *he* had done so far as we discover is this:

> "I have spent in the aggregate about $3,500.00 in complying with the legal requirements."

At the trial of this cause,

> "It appeared, without conflict from the evidence, that the defendant did not at any time conduct any water upon any part of said tract No. 113; that he did not, at any time irrigate or cultivate any part thereof or at any time plant, raise, or produce any crop or crops of any kind thereon" (Record, p. 102).

It was also shown and admitted by the defendant at the trial that after he was expelled from the land by process of law in the year 1909—

> "He did no other work of any other kind or character on the land, and that the plaintiff again took possession of the land and *completed the reclamation* thereof" (Record, p. 126).

Thus the evidence at the trial completely negatived the inference which Cox intended to be drawn, and which apparently the officers of the land office did draw from his testimony in making final proof, that *he* had reclaimed the land, had cultivated it, raised crops, etc., and that he had conducted water onto the land for such purposes.

As to the matter of water, his statement in making final

proof was in substance that he owned or controlled, or had a clear right to the use of water sufficient to irrigate all the land and keep it irrigated. That he acquired such water "through the canal system of the Imperial Water Company No. 5 by the purchase of water stock in the company, and maintained" it by payment of fifty cents per acre-foot for water and necessary assessments. Then he stated that "*such* water has been conducted" upon all the land for which the proof is made (Record, pp. 96-97). The evidence at the trial was that he had purchased certain shares of water stock "which he endeavored to have placed on the land, but this was refused by the water company because Miss Hart had already placed water stock on forty acres" on another tract. The grounds or reasons for such refusal are not plain; but it is plain that Cox did not control the water as he testified in making final proof; and it was further proved that the water company during the year 1909

> "completed its ditch to the high corner of said tract No. 113 and thereafter delivered water *to the plaintiff*, (not to Cox) for the irrigation of said land; but at no time did said water company deliver water to the defendant for use on said land, nor did the defendant use any water on said land" (Record, 126-7).

The plaintiff was the person who reclaimed the land—not Cox. No work of any kind was ever done by Cox on the land after March 15, 1909 (Record, p. 116). The simple truth is that Cox made proof in 1916 of the reclamation of the land which had been *effected entirely by the plaintiff*, and falsely declared that water which he allegeed himself to have acquired, had been conducted onto the land (Record, pp. 96-7), which was untrue. Only for reclamation effected

by him "or his assignors" was he entitled to credit. Such is the statute. (26 Stats., 1096.)

The plaintiff protested against the final proof made by Cox and demanded leave to cross-examine him and his witnesses, which demand for leave to cross-examine was denied (Record, pp. 35, 36, 37, 186-7) and also filed an application to contest the entry (Record, pp. 29, 30, 188, 192). Cox moved that the contest be dismissed and the motion was sustained and on the appeal from the order of dismissal the action was affirmed (Record, pp. 207-8). The appellee did all she could to resist the making of final proof by Cox on false evidence.

> "An entry procured through false and fraudulent testimony must be cancelled." Syllabus, San Lorenzo *vs.* Ries, 13 L. D. 612.
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> "The department is convinced that, for the purpose of annual proof of yearly expenditures required by the Desert Land Law, credit cannot be given for improvements placed upon the land by a former entryman."
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> Herrin *vs.* Hicks, 41 L. D., 601-603.

> "A fraudulent entry of public land allowed by a register and receiver, upon false proofs of *settlement, occupancy,* and *house-keeping,* may be set aside and vacated by the Commissioner."
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> Harkness *vs.* Underhill, 1 Black, 316, 325.
> Orchard *vs.* Alexander, 157 U. S., 377, 379.
> Diller *vs.* Hawley, 26 C. C. A., 514; 81 Fed. Rep., 551.

The principles upon which the courts act in such cases are stated in the leading case of Johnson *vs.* Towsley, 13 Wall., 72, 84-87. Illustrations occur in American Mortgage Co. *vs.*

Hopper, 64 Fed. Rep., 553, and numerous cases cited at pp. 555-6. (12 C. C. A., 295-6.)

A patent for a homestead issued upon false proofs of residence on the land will be vacated at the suit of the Government. United States *vs.* Perry, 45 Fed. Rep., 758.

We submit it to be plain on the evidence that the final proofs upon which Cox received the patent in suit constituted an imposture; he did not tell the truth. In forbidding the appellee to expose the imposition, the action of the officers of the Land Department, apparently constrained by the previous ruling in favor of Cox (Rec., p. 207), was a reward for fraud not merely as against an adverse claimant but upon the law itself.

XI.

THE CASE OF HENDERSON T. DIZNEY, 41 L. D., 257.

This is the case cited by the Hon. Assistant Secretary in the present case (Record, p. 183) to support the opinion that the "Act of March 28, 1908 had no application whatever" to the lands in the Imperial Valley. The statement in the case of Dizney to that effect was made in apparent oblivion of the contrary decision in the case of Virgil Patterson less than a year before, 40 L. D., 264, 266, where it was explicitly ruled that Patterson, under the Act of March 28, 1908, in virtue of his possession and commencement of reclamation, acquired a "preference right," and, "subject to the timely exercise of such right," such interest in certain desert lands of the Imperial Valley by reason of

his prior occupation and improvement thereof as entitled him to obtain title thereto under the Desert Land Law, 40 L. D., 266.

To our minds, the statement in the case of Dizney that the said Act of March 28, 1908 had no application to lands in the Imperial Valley, seems utterly unnecessary to that decision; for the dispute related to lands within a 36th section, the property of the State of California. Of course the title of the State or its grantee was paramount under the Act of March 3, 1853 (10 Stats., 246). The Department there said:

> "The present applicants went into possession of the land long after this tract had been marked out upon the ground as being the property of the State of California," etc.

It was not required at all to pass on the matter whether the Act of March 28, 1908, took effect in the Imperial Valley. The holding of the Secretary in Hart *vs.* Cox (Record, 183), therefore finds its authority in a non-judicial dictum contrary to the former *decision* in the case of Patterson, 40 L. D., 266; a revolutionary dictum itself unfounded in law.

In declaring that the Act of March 28, 1908, 35 Stats., 52, had no application in the Imperial Valley, the honorable Assistant Secretary attempted a distinction between this case and the case of Virgil Patterson (40 L. D., 264, 266), which seems to us most fallacious. The point of that decision was that Patterson had taken possession and had proceeded with

the reclamation of his land while it had the status of unsurveyed land, and hence that the *proviso in the Act of March 28, 1908, was operative for his protection.* Observe now the grounds upon which the Honorable Assistant Secretary declared the controversy in the present case, when it was before him, to be distinguishable from the decision in said case of Virgil Patterson. He said:

> "The acts of performance on the land in that case (*re* Patterson, 40 L. D., 264) were subsequent to the passage of said act (of March 28, 1908), and there was no adverse private interest involved, the conflict therein being with a subsequent withdrawal of the land for Government use. Under such circumstances equitable considerations existed why the Government should not allow its own withdrawal to prejudice the perfection of Patterson's claim and *why he should be considered as having a preference right under said act and the rule of the Land Department that said lands occupied the status of unsurveyed lands.* No such conditions exist in this case, which is one of conflicting private interests only and determinable under the law in force when such conflict arose" (Record, pp. 183-4).

Obviously the point and ground of the distinction drawn by the Assistant Secretary between the present controversy and that in the case of Patterson was that while the proviso in the statute of March 28, 1908, was *operative* to protect Patterson as against withdrawal of land by the Government after his settlement and reclamation had been begun *it is not operative* when the dispute arises between private claimants. This view we claim to be totally untenable. The asserted ground for denying that the act had effect in the

Imperial Valley was that the lands there "were in fact *surveyed* lands" (Record, p. 183). If the reason is sound, then clearly the act could not have operation there *at all*. There is not a word in the Act of March 28, 1908, that lends the slightest countenance to the notion that the proviso is to be operative sometimes, and sometimes not, or operative in part and not wholly, or against withdrawal of land by the Government and not for other purposes. The attempted distinction is impossible.

It is respectfully submitted that the mistake and error of the department in issuing a patent to appellant for the land in suit was one of the most egregious that ever came before this court for review, and the decree appealed from should be affirmed.

GEO. H. P. SHAW,
WM. J. HUNSAKER,
EUGENE W. BRITT,
Solicitors for Appellee.

adapted; enclosure, or physical occupancy of every part, is not necessary. P. 433.

2. Plowing of a furrow around 320 acres of unoccupied desert land, posting of a notice of claim, leveling, clearing, seeding, irrigating and fencing of parts, with some ditch construction, and marking of a boundary with stakes, *held* a taking of possession of the entire tract and commencement of the work of reclaiming it, within the intent of the Act of March 28, 1908, c. 112, § 1, 35 Stat. 52, amending the Desert Land Law, as against an adverse claimant who occupied part of the tract subsequently, with notice. P. 433.
3. The office of a proviso is to except something from the operative effect, or to qualify or restrain the generality, of the substantive enactment to which it is attached. P. 435.
4. The Act of March 28, 1908, *supra*, restricted the right to enter desert land to surveyed land, but contains a proviso that any qualified individual "who has, prior to survey, taken possession of a tract of unsurveyed desert land," and "has reclaimed or has in good faith commenced the work of reclaiming the same," shall have the preference right to make entry within 90 days after the filing of the approved plat of survey in the district land office. *Held*, that the proviso includes a case in which possession and work began before the date of the act no less than cases in which they were subsequent. P. 434.
5. Public lands lose their status as "surveyed lands" and become "unsurveyed" when the lines and marks of the original survey have become obliterated for practical purposes and when, for that reason, a resurvey has been directed by an act of Congress. P. 436.

270 Fed. 51, affirmed.

APPEAL from a decree of the Circuit Court of Appeals affirming a decree of the District Court which adjudged the appellee to be the equitable owner of a tract of land patented to the appellant under the Desert Land Laws, and directed a conveyance of the legal title.

Mr. Charles R. Pierce, with whom *Mr. John M. Sutton* was on the briefs, for appellant.

Mr. Eugene W. Britt, with whom *Mr. George H. P. Shaw* and *Mr. William J. Hunsaker* were on the brief, for appellee.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This case involves conflicting claims to a tract of 160 acres of land in Imperial County (formerly San Diego County), State of California. The facts, so far as necessary to be stated, are as follows:

About the years 1854–1856 the body of public lands, which includes the tract in controversy, was surveyed under the authority of the United States. No settlements upon these lands of any consequence were made until the year 1900. In the interval the marks of the survey had so far disappeared as to render it practically impossible to locate the lines which the survey had established. None of the section or township corners originally placed upon or in the vicinity of the land here involved was in place, and it was impossible to determine by reference to that survey in what section it was located.

On July 1, 1902, Congress provided for a resurvey of this body of public lands, by an act (32 Stat. 728) as follows:

"That the Secretary of the Interior be, and he is hereby, authorized to cause to be made a resurvey of the lands in San Diego County, in the State of California, embraced in and consisting of the tier of townships thirteen, fourteen, fifteen, and sixteen south, of ranges eleven, twelve, thirteen, fourteen, fifteen, and sixteen east, and the fractional township seventeen south, of ranges fifteen and sixteen east, all of San Bernardino base and meridian; and all rules and regulations of the Interior Department requiring petitions from all settlers of said townships asking for resurvey and agreement to abide by the result of the same so far as these lands are concerned are hereby abrogated: *Provided,* That nothing herein contained shall be so construed as to impair the present bona fide claim of any actual occupant of any of said lands to the lands so occupied."

The resurvey thus authorized was made and the approved plats filed in 1909.

On March 28, 1908, Congress passed an act to limit and restrict the right of entry and assignment under the desert land law and to authorize an extension of the time within which to make final proof (35 Stat. 52). Section 1 of that act is as follows:

"That from and after the passage of this Act the right to make entry of desert lands under the provisions of the Act approved March third, eighteen hundred and seventy-seven, entitled 'An Act to provide for the sale of desert lands in certain States and Territories,' as amended by the Act approved March third, eighteen hundred and ninety-one, entitled 'An Act to repeal timber-culture laws, and for other purposes,' shall be restricted to surveyed public lands of the character contemplated by said Acts, and no such entries of unsurveyed lands shall be allowed or made of record: *Provided, however,* That any individual qualified to make entry of desert lands under said Acts who has, prior to survey, taken possession of a tract of unsurveyed desert land not exceeding in area three hundred and twenty acres in compact form, and has reclaimed or has in good faith commenced the work of reclaiming the same, shall have the preference right to make entry of such tract under said Acts, in conformity with the public land surveys, within ninety days after the filing of the approved plat of survey in the district land office."

The appellee (plaintiff below), during the year 1906, being then of age and qualified, began the work of reclaiming a tract of three hundred and twenty acres, including the lands here in controversy. Previously, and shortly before she was of age, her father, acting in her behalf, had caused a furrow to be plowed around the entire three hundred and twenty acre tract, and had posted a notice claiming it for the appellee. During the year 1906 appellee caused about eighty acres of that portion of

the tract lying east of the lands in controversy to be levelled, cleared and seeded to barley, and ditches for irrigating the same to be constructed. All the lands at that time were unoccupied desert lands, within the meaning of the land laws of the United States. The barley was irrigated several times during the year. After the crop had matured and during the year 1906 the appellee fenced the land upon which it had been grown, and also during the year seeded to barley about 5 acres of the 160 acres in controversy. This crop however did not mature. Early in November, 1906, the appellee constructed a head ditch along the east line of the specific tract in controversy and did some work in preparation for the irrigation of the south half thereof, and also put up stakes upon the south half to mark the lines. She also caused borders to be made along the east line in preparation for the construction of a head ditch. This was the state of things on November 8, 1906, when the appellant put up a tent house upon the land, established a residence and claimed the one hundred and sixty acre tract. Appellant saw the plowed furrows along the east and south sides of the land and was notified by appellee's father that that one hundred and sixty acre tract was included within appellee's three hundred and twenty acre claim. Appellant remained on the tract until he was ejected, in March, 1909, as the result of a judgment obtained by appellee against him in a state court. *Hart* v. *Cox*, 171 Cal. 364. Appellant during his occupancy constructed a ditch one-half mile in length and did some other work on the land.

Appellant, in July, 1907, filed an application for the land in the local land office, but his application was rejected for the reason that the description was defective. Later in the same month appellee filed an application for the entire three hundred and twenty acre tract, but her application was rejected.

In March, 1909, after the resurvey had been completed, appellant filed a new application and shortly thereafter

and within ninety days after the filing of the survey plat, appellee also filed a new application, both applications describing the lands with reference to the resurvey. Decision was rendered in the local land office in favor of appellant. The Commissioner of the General Land Office reversed this decision but the Secretary of the Interior reversed the Commissioner and affirmed the local land office in favor of appellant. Subsequently, on October 24, 1918, a patent was issued to the appellant for the land in controversy.

Appellee thereupon brought suit against the appellant in the United States District Court for the Southern District of California, and prayed a decree declaring that appellant held the land in trust and requiring appellant to convey the legal title to her. That court rendered a decree in favor of appellee and the case was carried by appeal to the Circuit Court of Appeals for the Ninth Circuit, where, after hearing, the decree of the District Court was affirmed. 270 Fed. 51. The case is here upon appeal from the Circuit Court of Appeals.

The rights of the parties turn upon the meaning and effect of the proviso to § 1 of the Act of March 28, 1908, heretofore quoted. That proviso is, in substance, that where a qualified entryman has *prior to survey taken possession* of a tract not exceeding three hundred and twenty acres of *unsurveyed* desert land and has reclaimed or in good faith *commenced the work of reclaiming* the same he shall have the preference right to make entry of such tract within ninety days after the filing of the plat of survey in the local land office. Two questions are, therefore, presented for solution:

(1) Did appellee take possession of the lands and reclaim or in good faith commence the work of reclaiming the same prior to the attempted appropriation by appellant?

(2) Were the lands at the time *unsurveyed* desert lands, to which upon the facts the statutory preference

right to make entry attached? Appellant denies that the lands were unsurveyed and contends, moreover, that, in any event, appellee is not within the terms of the proviso since whatever she did was prior to the passage of the act which is not to be given retrospective operation.

1. Prior to appellant's occupation on November 8, 1906, appellee had entered upon and exercised and was then exercising the acts of dominion herein set forth over the 320 acre tract under a claim of right. When appellant entered upon the land all these evidences of appellee's claim and possession were open and visible and in addition appellant was specifically notified that the claim included the land in controversy.

What will constitute possession of land largely depends upon its character, condition and the use to which it is adapted. Here appellee went upon the land for the purpose of reclaiming it from its desert character. The whole of it obviously could not be reclaimed at once. The building of ditches, the securing of a water supply, the plowing and preparation of the land and the planting of crops were all steps requiring time. Residence upon the land was not required as a prerequisite to securing title under the desert land laws. Having in view all the conditions we are of opinion that the facts sufficiently establish appellee's actual possession of the entire tract at the time appellant sought to make his appropriation. *Ellicott* v. *Pearl*, 10 Pet. 412, 442; *Ewing* v. *Burnet*, 11 Pet. 41, 53; *Hart* v. *Cox*, 171 Cal. 364; *Booth & Graham* v. *Small & Small*, 25 Iowa, 177, 181; *Illinois Steel Co.* v. *Bilot*, 109 Wis. 418, 443, 446. It is not necessary to constitute actual possession that there should be an enclosure or any physical or visible occupancy of every part of the land. As well said by the Supreme Court of Iowa in *Booth & Graham* v. *Small & Small, supra:*

"Possession of land is the holding of and exclusive exercise of dominion over it. It is evident that this is not,

and cannot be, uniform in every case, and that there may be degrees in the exclusiveness even of the exercise of ownership. The owner cannot occupy literally the whole tract,—he cannot have an actual *pedis possessio* of all, nor hold it in the grasp of his hands. His possession must be indicated by other acts. The usual one is that of inclosure. But this cannot always be done, yet he may hold the possession in fact of uninclosed land, by the exercise of such acts of ownership over it as are necessary to enjoy the ordinary use of which it is capable, and acquire the profits it yields in its present condition,—such acts, being continued and uninterrupted, will amount to actual possession, and, if under color of title, or claim of right, will be adverse." That appellee, in addition to taking possession of the entire 320 acres before appellant's occupancy, had in good faith commenced the work of reclaiming the same does not admit of doubt. Indeed she had actually reclaimed more than one-fourth of the entire area, which included five acres of the tract in controversy.

2. It remains to determine whether the lands at the time appellee took possession of them were *unsurveyed* lands and whether appellee was entitled to the preference right granted by the proviso heretofore quoted.

We first dispose of the contention that, even if the lands were unsurveyed, it cannot be held that appellee was within the terms of the proviso because that would be to give the proviso a retroactive effect and there is nothing to show that Congress so intended. The rule is, of course, well settled that unless the contrary plainly appear a statute operates prospectively only. Does the application of the proviso here proposed contravene this rule?

Prior to the Act of March 28, 1908, 35 Stat. 52, unsurveyed lands, as well as surveyed lands, came within the purview of the Desert Land Laws (19 Stat. 377). That act, however, from and after its passage restricted "the right to make entry of desert lands . . . to *surveyed*

public lands" and expressly declared that "no such entries of *unsurveyed* lands shall be allowed or made of record." Then follows the proviso now being considered. The office of a proviso is well understood. It is to except something from the operative effect, or to qualify or restrain the generality, of the substantive enactment to which it is attached. *Minis* v. *United States*, 15 Pet. 423, 525. Although it is sometimes misused to introduce independent pieces of legislation. *Georgia Railroad & Banking Co.* v. *Smith*, 128 U. S. 174, 181; *White* v. *United States*, 191 U. S. 545, 551. Here, however, the proviso is plainly employed in its primary character. The effect of the substantive enactment was to forbid the entry of unsurveyed lands. But the law theretofore had been otherwise and one purpose of the proviso evidently was to exclude from the operative effect of the new rule cases which might have arisen under the prior law,—that is cases of persons who had taken possession of and undertaken to reclaim unsurveyed lands at a time when the law conferred the right to do so. Any such person, no less than one who acted subsequently, is within the words of the proviso. He is literally "a person who has, prior to survey, taken possession," etc. The proviso so construed impairs no vested right and brings into existence no new obligation which affects any private interest. No reason is perceived why the words employed should not be given their natural application and so applied the case of appellee is included. Indeed, this does not give the proviso a retroactive operation. The language in terms applies to one who at the time of the enactment occupied a particular *status*, viz: the status of a person who *has done* the things enumerated. A statute is not made retroactive merely because it draws upon antecedent facts for its operation. *Regina* v. *Inhabitants of St. Mary, Whitechapel*, 12 Q. B. Rep. 120, 127; *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 342.

Passing this point, however, it is contended that the lands in question were in fact surveyed. It is true the lands had been surveyed in 1854–1856, but the lines of that survey by the year 1900 had disappeared to such a degree that for practical purposes they had become non-existent. A survey of public lands does not *ascertain* boundaries; it *creates* them. *Robinson* v. *Forrest*, 29 Cal. 317, 325; *Sawyer* v. *Gray*, 205 Fed. 160, 163. Hence the running of lines in the field and the laying out and platting of townships, sections and legal subdivisions are not alone sufficient to constitute a survey. Until all conditions as to filing in the proper land office and all requirements as to approval have been complied with, the lands are to be regarded as unsurveyed and not subject to disposal as surveyed lands. *United States* v. *Morrison*, 240 U. S. 192, 210; *United States* v. *Curtner*, 38 Fed. 1, 10. It follows that although the survey may have been physically made, if it be disapproved by the duly authorized administrative officers the lands which are the subject of the survey are still to be classified as unsurveyed. In other words, to justify the application of the term "surveyed" to a body of public land something is required beyond the completion of the field work and the consequent laying out of the boundaries, and that something is the filing of the plat and the approval of the work of the surveyor. If, pending such approval, or, still more, if after disapproval of the survey, the lands in contemplation of law are unsurveyed, it is difficult to see why the same result may not follow when the survey originally approved and platted is subsequently annulled or abandoned because the lines and marks established have become obliterated. A purpose to annul or abandon such survey we think may be disclosed by an act of Congress directing a resurvey plainly based upon the fact of such obliteration.

Turning now to the record in the case under consideration it appears that the lines and marks of the original

survey of 1854–1856 had for all practical purposes ceased to be. This is apparent not only from a consideration of the record but is in accord with repeated declarations of the land department. See *In re Peterson*, 40 L. D. 562, 566, 570, where it is said not only that all the corners which had been established north of the fourth standard parallel were missing, but that the survey itself was "grossly inaccurate," that in making the resurvey an attempt to retrace the old original survey had failed " and it is now a physical impossibility to identify on the ground sections 16 and 36, according to the original surveys. . . . All vestiges of that survey have been wiped away." See also *Stephenson* v. *Pashgian*, 42 L. D. 113, 114. In the land office contest between the parties hereto for the land in controversy the Secretary of the Interior, although ruling in favor of appellant, stated that the description of the land by reference to the lines of the old survey " was an impossible condition." *Hart* v. *Cox*, 42 L. D. 592, 594. Both courts below reached the same conclusion.

The District Court said: " The evidence of the survey of 1856 upon the ground in that vast area, covered by said act had become useless, by reason of the fact that the lines of the survey were obliterated, and all that was left were some prominent monuments. This act [the resurvey act] recognized that the survey of 1856 was of no practical use and that the lands were, for all practical purposes, unsurveyed lands. It was impracticable to dispose of these lands by congressional subdivision according to the survey of 1856."

The Circuit Court of Appeals, after referring to the original survey and the fact that no settlement was made until nearly fifty years later, said:

" It was then found that the marks of the survey had so far been obliterated that it was practically impossible to locate the lines thereof." *Cox* v. *Hart*, 270 Fed. 51.

From the foregoing it results and we hold that the Resurvey Act of 1902 was in effect and intent a legislative

COX *v.* HART.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 71. Argued November 16, 1922.—Decided December 11, 1922.

1. What will constitute possession of a tract of land depends largely upon its character and condition and the use to which it is

declaration that the lands therein described were, when the act was passed and for all purposes of settlement and sale, unsurveyed lands. With the disappearance of the physical evidences the old survey survived only as an historical event. As a tangible, present fact it ceased to exist and a new survey became necessary to reëstablish the status of the area over which it had extended as surveyed lands of the United States.

The decree below is

Affirmed.